TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 148

SWISS OIL CORPORATION, PLAINTIFF IN ERROR,

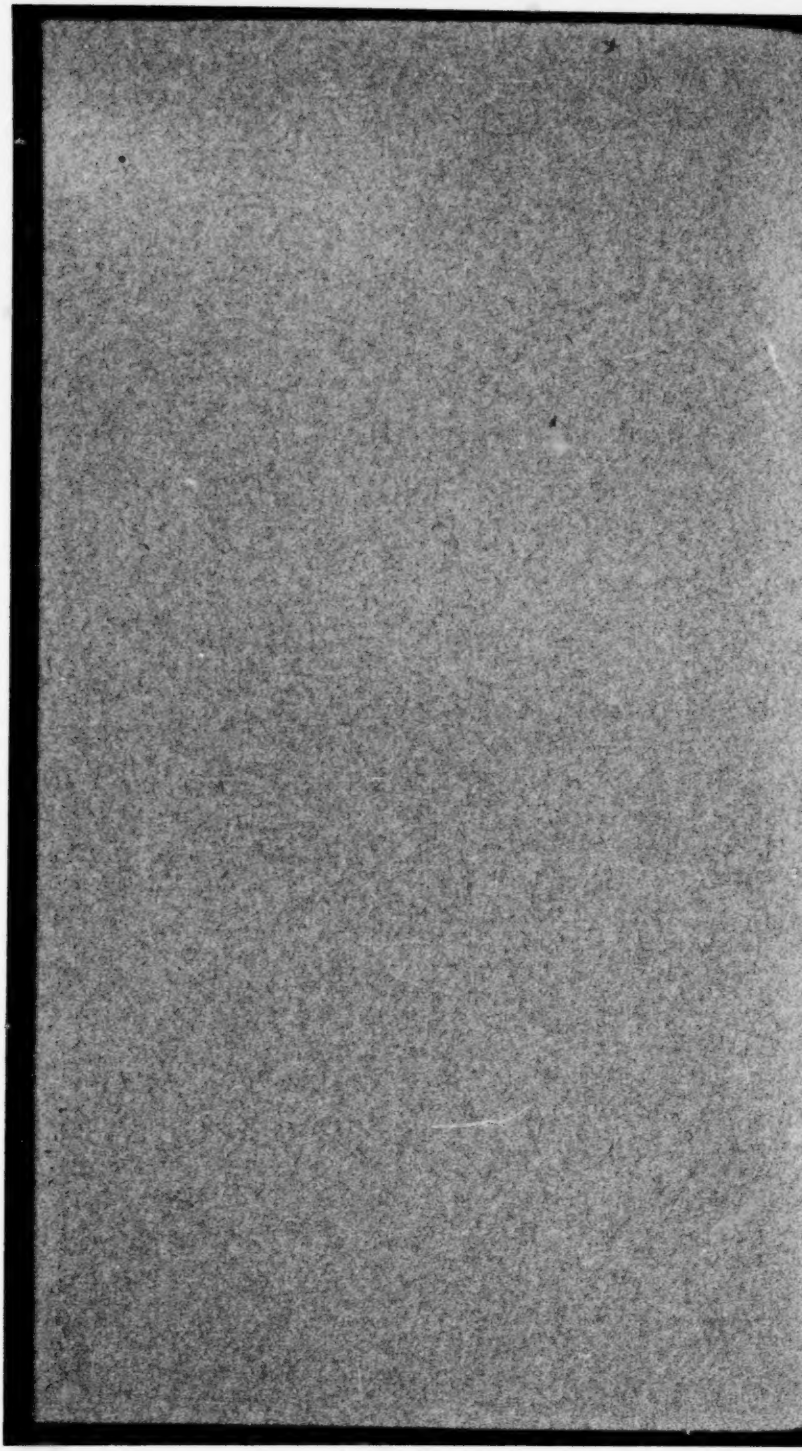
vs.

WILLIAM H. SHANKS, AUDITOR OF PUBLIC ACCOUNTS FOR THE COMMONWEALTH OF KENTUCKY

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

FILED JUNE 30, 1926.

(31,279)



(31,279)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 556

SWISS OIL CORPORATION, PLAINTIFF IN ERROR,

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1925

[fols. 1 & 2] [Caption omitted]

[fol. 3] **IN CIRCUIT COURT OF FRANKLIN COUNTY**

#31986

SWISS OIL CORPORATION, Plaintiff,

vs.

W. H. SHANKS, Auditor of the Commonwealth of Kentucky, Defendant

PETITION—Filed April 11, 1924

The Plaintiff, Swiss Oil Corporation, states that it is a corporation, duly organized under the laws of the Commonwealth of Kentucky, having its principal office and place of business at Lexington, Kentucky, having power to sue and be sued, and with other powers incident to corporations generally, and that it has for more than five years past been engaged in producing crude oil from wells in Kentucky.

It states that during and including the months of March 1922 to February 1924 inclusive, it produced from wells on lands on which it owned and controlled oil and gas leases, granting it the right to produce oil, in the State of Kentcky, 421,125.53 barrels of crude oil or petroleum, of the market value of $894,463.91, all of which oil was run and transported during said period, from tanks at or adjacent to the place of production into pipe lines operated by companies which transported said oil from such places of production to refineries or to storage tanks outside the State of Kentucky, where it was held to await the sale and market thereof, by far the greater part of such production having been immediately and continuously transported from such places of production to points in other states [fol. 4] outside of the State of Kentucky.

Said oil was produced by Plaintiff from lands in Lee, Magoffin and other Counties, and was so transported from the places of production by pipe lines operated by Cumberland Pipe Line Company, National Refining Company, and other companies engaged in the business of transporting and purchasing such crude oil.

In compliance with the provisions of an Act of the General Assembly of the Commonwealth of Kentucky approved March 29, 1918, and being Chapter 122 of the Session Acts of 1918, each and all of said transporters reported to the State Tax Commission each month the amount of such oil transported by them from the properties and belonging to this Plaintiff together with the amount of all other oil so transported by them from the places of production, together with the market value of such oil, and paid to said State Tax Commission the tax assessed for State Purposes of one per cent. of the value of all such oil, such payment being made by said transporter

as required by said Act, and collected from this Plaintiff and the other producers of such oil by said transporters in either money or crude petroleum.

A copy of said Act is filed herewith as part hereof, marked "Exhibit Act of 1918"

The title of said Act is as follows:

"An Act to amend and re-enact chapter 9 of the Acts of the Extraordinary Session of the General Assembly of 1917, which Act imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this State, and authorizing county purposes, providing methods of determining the amount of tax due and prescribing the manner of payment of State tax and imposing penalties for the violation of the Act."

Said chapter 9 of the Acts of the Session of 1917 referred to in [fol. 5] said title was an Act which was approved May 2, 1917, and a copy of said Act is filed herewith as part hereof marked "Exhibit, Act of 1917."

Said extraordinary Session of the General Assembly 1917 was [fol. 6] convened by the Governor for the sole purpose of considering the subject of revenue and taxation, the fiscal affairs of the State being, according to the Proclamation convening said Session, unsound and demanding immediate relief,

The first section of said Act as introduced and first passed in the House of Representatives, being House Bill No. 49 was in part as follows:

"Every person, firm, corporation, or association engaged in the business of producing oil in this State, by taking same from the earth, shall in addition to the other taxes imposed by law annually pay a tax for the right or privilege of engaging in such business equal to one percentum of the market value of all oil produced in this State, and such tax shall be for State purposes," etc.

Said Act was amended by the Senate on April 24, 1917, by striking out the words "in addition to" and inserting in lieu thereof the words "lieu of all" and by inserting the words "on the wells producing said oil" so that said part of said Act as so amended and as finally passed and approved was as follows:

"Every person, firm, corporation or association engaged in the business of producing oil in this State, by taking same from the earth, shall, in lieu of all other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to 1 per centum of the market value of all oil produced in this State, and such tax shall be for State purposes."

The Amendment and passage of said Act in said form followed a conference between certain persons engaged or interested in the production of crude oil and officials of the State desirous of effect-

ing legislation which would produce to the State greater revenue from oil producing properties than that theretofore derived. It was recognized by all such persons that the laws for the ad valorem assessment of such property as theretofore administered did not operate fairly nor produce an adequate revenue to the State, and said producers agreed to the enactment of a law by which the oil produced should be taxed, as indicated in said Act, and it was fairly agreed [fol. 7] and understood that the method of taxation so provided was a complete system for the taxation of such property and was to be in lieu of all other taxes thereon.

Pursuant to such agreement and understanding the law was so construed and administered by the officers of the State, the State Tax Commission advising and directing the producers of such oil who paid the tax thereby imposed, not to list for ad valorem taxation the wells and property from which such oil was produced.

At the following session of the General Assembly of 1918, the above mentioned Act was enacted, further and more definitely indicating the intention of the Legislature to provide a production tax as the exclusive and complete method of taxing such property, and materially altering the method and means for collecting said tax.

It was, however, held and determined by the Court of Appeals in the case of Raydure vs. Board of Supervisors of Estill County, reported in Volume 183 of Kentucky Reports at page 84, that the Legislature had no power under the Constitution of the State to substitute such license or production tax for the advalorem method of taxing such property, nor to exempt said property from such ad valorem taxation, and that all such property was and is subject to taxation according to its fair cash value as provided by Sections 171 and 172 *if* said Constitution.

Accordingly Plaintiff like all other such producers of oil and owners of such leases and property in this State, has been required to list its wells, leases, rights, and all material and equipment used in connection therewith with the County Tax Commissioner in each County where the same is located at its fair cash value for taxation, and such property of this Plaintiff has been assessed, and Plaintiff has been required to pay and has paid all State, County, and local taxes imposed thereon for every year for which same was liable.

[fol. 8] Through the Inquis-torial powers of the State Tax Commission, the assessing officers and boards are and have been furnished with detailed information demanded and secured by said Commission from the pipe line companies and transporters taking the Oil from the tanks at the place of production, as to the amount of oil so taken from each lease and property of Plaintiff, and of other producers, and it is the practice and rule of such assessing authorities to fix and assess the value of such properties producing crude oil at the full cash value of all the oil estimated to be in place in said properties or that may be expected to be produced therefrom together with the value of all equipment used in connection with such operation, so that said property has been and is subject to the full burden of ad valorem taxation imposed by the general laws of the State.

Plaintiff says that in addition to such ad valorem taxes imposed upon and paid by it, there has been exacted from it and has been paid by the transporters of its oil produced by it, and transported in said month of March, 1922 to February, 1924 inclusive, the sum of $8,944.64 being one per cent of the market value thereof, all of which sums were paid to said State Tax Commission as taxes for the State of Kentucky, and turned into the Treasury thereof.

Said transporters were required and compelled to report the amount and value of such oil so transported by them and to pay the said tax thereon, by the terms of said Act, and did so in order to avoid the heavy penalties of $50.00 imposed thereby for each day such transporter should fail to either report or pay the tax at the time required thereby.

There is attached hereto as part hereof a statement or schedule showing the number of barrels of oil, and the market value thereof produced by this Plaintiff and transported in each of said months during all of the period aforesaid, and showing the total amount of the said tax exacted from it as aforesaid which is marked "Exhibit [fol. 9] A." The plaintiff further states that the exaction and collection of said sum of $8,944.64 and of all thereof as a tax against said Plaintiff or its property was and is illegal and without authority of law.

The said Act of 1918 under which said tax was imposed was and is void because it is in contravention of the Constitution of Kentucky and also in contravention of the Constitution of the United States.

The said Act was designed and intended to substitute a production tax, based and imposed upon the production obtained from oil producing properties as a complete system of taxation of such property, instead of and for the ad valorem method of taxing said property theretofore in effect which is an annual tax based and assessed upon the fair cash value of such property as provided by Sections 171 and 172 of the constitution of Kentucky, by the terms of said Act it was provided that the said tax on production thereby imposed should be in lieu of all other taxes on the wells producing said crude petroleum, and without such provision for exemption from such other taxation the Legislature did not and it is not to be assumed that it would have imposed such production tax. Said attempt at exemption from such other, or ad valorem taxation, being void, as in contravention of the said provisions of Sections 171 and 172 of the Kentucky Constitution, the whole of said Act, including the impositions of such production tax, is therefore void.

Said Act is also void for the reason that the tax thereby imposed is in substance and effect a tax upon property which is already subject to the ad valorem tax imposed by general laws pursuant to said Sections 171 and 172 of the Kentucky Constitution, and is not only in contravention of said provisions requiring an annual tax, and an assessment of the property for taxation at its fair cash value estimated at the price it would bring at a fair and voluntary sale, but since it imposes an additional tax on the same property for the same pur- [fol. 10] poses, and at the same time, which is not required in the

case of other classes or kinds of property it is in contravention of the provisions of said Section 171 requiring that taxes shall be uniform.

The tax imposed by said Act is not a license tax on occupation nor a special or excise tax within the meaning and intent of Section 181 of the constitution of Kentucky, but in its essence and nature is a tax imposed directly upon the property, crude oil at the time it is first transported from the place of production. The tax imposed is in effect an attempt to tax the mere right to own and hold property which cannot be the subject of excise since the levying of a tax by reason of the ownership of property or transportation thereof is a tax on the property itself. The mere right to own crude petroleum and store same in tanks or other receptacles to await transportation or sale and the transportation of such oil from the place of production is not an occupation as that term is used in Section 181 of the Constitution.

By the terms of said Act the assessment of the value of the oil produced, one per cent of which is required to be paid as taxes, is required to be made and fixed by the State Tax Commission, no provision being made for notice to the owner of such oil, or person from whom the tax is exacted, and no provision being made, and no opportunity being given to such person to either appear or be heard as to the value thereof or to appeal from such assessment.

The said Act 1918 is also invalid in that by its title it undertakes to amend and re-enact Chapter 9 of the Acts of the Extraordinary Session of the General Assembly of 1917, while in the body of the Act no reference is made to the Sections or the provisions of the former Act which are sought to be amended, or the Sections or provisions [fol. 11] which are sought to be re-enacted; and there is an utter failure to set out in full or at length as required by Section 51 of the Constitution the wording of the Act after same has been amended, revised or extended.

Said Act purports to amend and re-enact Chapter 9, Acts 1917, when it in fact provides for the levy and collection of an entirely new tax imposed upon persons engaged in another business having no relation to the tax imposed by Chapter 9, of the Acts of 1917—the former tax imposes a license or franchise tax on the "business of producing oil in this State by taking same from the earth" and the amendment as found in Chapter 122 page 540 imposes a tax on the crude petroleum oil when same is first transported from the place of production and requires the transporter to pay the tax and collect it from the owner who may not be, and frequently is not the producer of such oil. The title of said Act does not express its purpose, is misleading, and violates Section 51, of the Constitution of the Commonwealth of Kentucky; and said Act for this cause is invalid.

Said Act is further void if considered as a license tax because it is imposed upon persons and owners of oil who are not engaged in the occupation of producing same, and the amount of the taxes imposed under such law, being more than the revenue required from such property by the general ad valorem tax, is not a proper or reasonable license tax, but is excessive, unreasonable, unequal, confiscatory, and prohibitive. Said Act was not intended as a license tax on the oc-

cupation of producing oil, but was designed to produce the enti
revenue which should be borne by that character of property, a
to administer and enforce it as a license tax, in addition to the su
jection of the property to the ad valorem tax, is to violate the inte
tion of the Legislature and to pervert said Act and convert it fro
a property tax to an unreasonable and confiscatory license tax nev
[fol. 12] contemplated nor intended by the Legislature.

Said Act is furthermore in contravention of the provisions of t
Constitution of the United States, Article 1, Sections 8 and 10 gra
ing to the Congress the exclusive right to regulate commerce b
[fol. 13] tween the several States, the imposition of the tax there
provided which by the terms of the Act is imposed and attached, wh
the crude petroleum is first transported from the tanks or oth
receptacles located at the place of production, being an unreasonab
and illegal interference with interstate commerce. The Cumberla
Pipe Line Company and other transporters who receive crude
into their gathering and pipe lines at the places of production a
common carriers and engaged in the transportation of such oil fr
such places in Kentucky to points in other States and immediate
upon their receipt of such oil at the tanks at the place of productio
there is commenced a continuous and uninterrupted journey
transportation of such oil to other States and the imposition of su
tax upon or after the commencement of such journey is an illeg
and forbidden interference with such commerce.

The Said Act is further void and in contravention of the Cons
tution of the United States, Article XIV, Section 1, because t
exaction of such a tax constitutes a deprivation of this plaintiff
its property without due process of law and denies it the equal p
tection of the law.

Plaintiff further states that said sum of $8,944.64 having be
paid into the State Treasury for taxes on the production of cru
oil belonging to it, when no such taxes were in fact due, it becam
and was the duty of the defendant, W. H. Shanks, who was and
the duly elected, qualified and acting Auditor of Public Accoun
of the Commonwealth of Kentucky, to issue his warrant on t
Treasury for such money so improperly paid in behalf of this pla
tiff.

On March 26, 1924 this Plaintiff made application and dema
upon said defendant, W. H. Shanks, as such Auditor, that he iss
his warrant on the Treasury in behalf of Plaintiff for said amou
for such purpose, and upon such ground, but said defendant fail
and refused and still fails and refuses to issue such warrant.

[fol. 14] Plaintiff further states that including the sums paid
taxes on the production of the oil of this Plaintiff as aforesaid the
have been paid into the Treasury of the State under and accordi
to the provision of said Act as taxes on oil produced, within the t
years last passed the sum of $327,704.24 no part of which was
fact due, and all of which was unlawfully and wrongfully exact
from the owners and producers of crude oil transported from t
places of production and reported by the transporters thereof
said State Tax Commission in compliance with said illegal act. Sa

sum constitutes a fund equitably belonging to the producers, and owners of said oil from whom it was so exacted and on whose behalf it was paid, and should in equity and good conscience be repaid to said persons. The persons so entitled to said fund are numerous, being many hundreds of individuals, corporations and firms and it would be impracticable to bring them before the Court within a reasonable time.

The questions involved herein as to the validity of said Act, and of the payment of such taxes, and right to recover same involve a common or general interest of all such persons and Plaintiff brings this action for the benefit of all such persons, and prays that it be permitted to represent and sue for the benefit of all persons from whom or from whose property such taxes have been exacted, and who may be entitled to recover from such fund the amount contributed by them or which was contributed on their behalf thereto, or so exacted from them and included therein.

Owing to the great number of persons owning the oil on account of which such tax was exacted and paid, and the facts that the transporters thereof made monthly reports of the aggregate amount of such oil transported by them respectively without indicating the owners thereof or the amount or value of the oil of the respective owners, the amounts of such taxes which have been paid on account [fol. 15] of such individual producers and owners are difficult of ascertainment, and the interests of said persons in said fund are so involved and commingled as to require the examination and segregation of voluminous and numerous accounts.

The ascertainment of the respective rights of said persons in the said fund so paid in for taxes should properly by done by the Court in this Action in order to avoid a multiplicity of suits.

Wherefore, Plaintiff prays that a writ of mandamus be granted commanding the Defendant, W. H. Shanks, as Auditor of the Commonwealth of Kentucky, to issue his warrant to and in behalf of the Plaintiff on the Treasury for the sum of $8,944.64, the amount so illegally exacted of it and paid into the Treasury for Taxes; and further prays for a writ of mandamus commanding said Auditor to issue his warrant on the Treasury to and on behalf of the Commissioner and receiver of this Court for the amount of all such other taxes paid on production of oil under said Act, within the two years last past, or in the event it should not be deemed proper to issue said separate warrants that such writ of mandamus be granted commanding said Auditor to issue his warrant for the aggregate of said Taxes so paid, viz., $327.704.24 in favor of the Commissioner and receiver of this Court, that said receiver be authorized to collect and realize upon said warrant and that distribution of same be made among all persons entitled thereto, and further prays for its costs and all proper and equitable relief.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Plaintiff.

[fol. 16] Sworn to by Thomas A. Combs; Jurat omitted in printing.

[fol. 17] EXHIBIT "A" TO PETITION

Crude Oil Produced by Swiss Oil Corporation

1922:	Barrels	Amount
March	18,718.29	$40,390.15
April	17,097.98	36,685.03
May	19,661.40	44,434.51
June	18,515.92	43,945.05
July	19,059.72	39,348.75
August	20,831.66	41,271.13
September	19,317.16	38,894.59
October	20,268.42	41,268.02
November	19,069.26	38,739.41
December	16,387.76	35,576.06
1923:		
January	18,145.95	44,864.40
February	15,746.52	45,014.49
March	17,478.51	49,530.03
April	17,891.17	44,557.50
May	18,145.37	39,221.03
June	17,798.28	35,164.72
July	15,010.80	26,103.54
August	18,753.23	32,004.03
September	15,766.71	25,433.38
October	17,608.52	26,491.37
November	16,392.68	23,435.53
December	15,021.27	23,632.93
1924:		
January	14,078.96	30,743.06
February	14,303.99	34,298.24
Total 24 Mos.	421,125.53	$881,043.95

100%	$894,463.91
1½% Tax	13,416.96
	881,046.95

State Tax, 1%	$8,944.64
County Tax, ½%	4,473.32
	13,416.96

[fol. 18] EXHIBIT TO PETITION

Copy of Act of 1917

Chapter 9

An act imposing a license or franchise on any person, firm, corporation or association engaged in the production of oil in this State and authorizing counties also to impose such tax for road, school and county purposes; providing methods of determining the amount of tax due and prescribing penalties for a violation of the provisions of the act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sec. 1. Every person, firm, corporation or association engaged in the business of producing oil in this State, by taking same from the earth, shall in lieu of all other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to 1 per centum of the market value of all oil produced in this State, and such tax shall be for State purposes, and in addition any county in the State may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of 1 per centum of the market value of all oil produced in such county, and the Fiscal Court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected, and when oil is produced in any separate taxing district in a county the Fiscal Court shall equitably distribute such taxes between the county and such taxing district.

Sec. 2. The State Tax Commission, from the reports hereinafter required to be made and from such other information as it may obtain, shall determine the fair market value of all oil produced in this State by any person, firm, corporation, or association, from the date this act goes into effect until the day on which the first report [fol. 19] is required to be made and thereafter from the day on which the last report was made until the day when the next report is required to be made. The State Tax Commission shall determine the fair market value of all oil produced in any county in this State and shall certify such value to the County Court Clerk within ten days after such value has been finally ascertained.

Sec. 3. It shall be the duty of the State Tax Commission, immediately after fixing such value to notify the person, firm, corporation or association of the fact and such person, firm, corporation or association shall have ten days from the time of receiving notice to go before said Commission and ask a change of the valuation and may introduce evidence, and said Commission is authorized to summons and swear witnesses, and after hearing such evidence, the Commission may change the valuation as it may deem proper and the action of the Commission shall be final.

Sec. 4. All the State taxes due under the provisions of this act from any person, firm, corporation or association shall be due and payable thirty days after notice of same has been given by the State Tax Commission, and all taxes due to any county shall be payable thirty days after the certification is made to the County Clerk, and every such person, firm, corporation or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent and a penalty of ten per cent on the amount of tax shall attach and thereafter such tax shall bear interest at the rate of ten per cent per annum. Any such person, firm, corporation or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action.

Sec. 5. It shall be the duty of the County Clerk, immediately [fol. 20] upon receiving the certification from the State Tax Commission, to certify same to the Sheriff or collector for collection.

Sec. 6. All State taxes due under the provisions of this acts shall be paid to the State Treasurer, and all county taxes shall be paid to the Sheriff or collector.

Sec. 7. Every person, firm, corporation or association engaged in the production of oil in this State within the meaning of this act shall make a report to the State Tax Commission on the first day of July, 1917, and every three months thereafter. The State Tax Commission shall furnish and prescribe the blanks upon which such reports shall be made. Any person, firm, corporation or association failing to make such report within thirty days after same is due, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day thereafter the report is not made and such fine may be recovered by indictment or civil action.

Sec. 8. Every pipe line company doing business in this State and receiving oil from any person, firm, corporation or association shall make a report to the State Tax Commission on the first day of July, 1917, and every three months thereafter, showing the quantity of oil received from each person, firm, corporation or association, and said report shall be made upon blanks fusnished and prescribed by the State Tax Commission, any pipe line company failing to make such report for thirty days after the date on which same is required to be made shall be deemed guilty of a misdemeanor, and upon conviction shall be fined $50.00 for each day thereafter that said report is not made, and said fine may be recovered by indictment or civil action.

Sec. 9. The blanks prescribed by the State Tax Commission shall be so prepared as to elicit information such as will enable the Commission to arrive at the fair market value of all oil produced in [fol. 21] this State and in the counties in this State, and such report shall be made by said companies through their chief officer or agent in this State, and shall be duly verified, and if any such officer or

agent makes a false report he shall be deemed guilty of false swearing and may be prosecuted.

Approved May 2, 1917.

[fol. 22] EXHIBIT TO PETITION

Exhibit Act of 1918

Chapter 122

An act to amend and re-enact Chapter 9 of the Acts of the extraordinary session of the General Assembly of 1917, which Act imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this State, and authorizing county officials to impose such tax for roads, schools and county purposes; providing methods of determining the amount of tax due and prescribing the manner of payment of State tax and imposing penalties for the violation of the Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sec. 1. Every person, firm, corporation or association producing crude petroleum oil in this State, shall, in lieu of all other taxes on the wells producing said crude petroleum, annually pay a tax equal to 1 per centum of the market value of all crude petroleum so produced, and such tax shall be for State purposes, and, in addition, any county in the State may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of one per centum of the market value of all crude petroleum produced in such county, and the fiscal court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected, and, when crude petroleum is produced in any separate taxing district in a county, the fiscal court shall equitably distribute such taxes between the county and such taxing district.

Sec. 2. Any county imposing the tax provided in Section 1 hereof shall immediately, after the levy of such tax, give notice thereof to each transporter of crude petroleum registered in said county, and the transporter of said crude petroleum shall, from and after the first day of the month immediately following such notice, proceed as hereinafter provided, to collect such county tax, and shall pay the [fol. 23] same to the Sheriff of such county, in the manner and at the time payment of such taxes shall be required to be made to the State Tax Commissioner. Each county imposing such tax shall also, upon the fixing of the levy, certify the same to the State Tax Commission, which shall make the assessment for such county tax, in the same manner and to the same value as provided for the State tax, which shall be certified to such county for collection.

Sec. 3. The tax hereby provided for shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production.

Sec. 4. Every person, firm, corporation or association required to report under Section 5 of this Act, shall register as a transporter of crude petroleum in the Clerk's office in each county of this State, in which such business is carried on by such transporter of crude petroleum, in a book which the State Tax Commission shall provide therefor, showing the name, residence and place of business of such transporter of crude petroleum, and it shall be the duty of the County Clerk of each county to immediately certify to the State Tax Commission a copy of each registration as made.

Sec. 5. Every person, firm, corporation or association engaged in the transportation of crude petroleum in the State from the tanks or other receptacles located at the place of production in the State, shall, for the purposes of this Act, be considered a transporter of crude petroleum, and every such transporter of crude petroleum shall make a monthly, ver-fied report to the State Tax Commission, on or before the 20th day of the month succeeding the month in which the crude petroleum is so received for transportation, showing the quantity of each kind or quality of all crude petroleum so [fol. 24] received from each county in the State and the market value of such crude petroleum on the first business day after the tenth day of the month in which such report is made and such report shall show any sales of such crude petroleum so received, in which event it shall show the quantity of crude petroleum in each sale, the date of each sale, and the market price of such crude petroleum on each date of sale for such preceding month, and said report shall be made upon blanks furnished and prescribed by the State Tax Commission.

Sec. 6. The State Tax Commission shall, upon receiving the reports provided for in Section 5 hereof, upon such reports and such other reports and information as it may secure, assess the value of all grades or kinds of crude petroleum so reported for each month, and, on or before the last day of the month in which such reports are required to be made, notify each transporter of crude petroleum so reporting of such assessment, and certify such assessment to the County Clerk of each county which has reported the levy of the county tax provided for in Section 2, for record, and such County Clerk shall immediately deliver a copy thereof to the Sheriff of such county for the collection of such county tax. The transporter so notified of the assessment shall have until the twentieth day of the month following such notice, in which to be heard by the State Tax Commission on any objection to such assessment, and the assessment shall become final on such twentieth day of the month and the tax be due and payable on that day. The State Tax Commission shall make the assessment of the value of the crude petroleum so reported by each transporter of crude petroleum as follows:

Where the report shows no sale of crude petroleum during the [fol. 25] month covered by such report, then the market value of crude petroleum on the first business day after the tenth day of the month in which the report is made shall be fixed as the assessed value of all crude petroleum covered by such report.

But where the report shows sales of crude petroleum during the month covered by such report, if it shows that all crude petroleum so reported has been sold, then the market price of such crude petroleum on each day of such sale or sales shall be the assessed value of all crude petroleum sold on such date of sale and the total amount of the tax to be reported as the assessment on such report shall be the total of the assessment or assessments made on such sale or sales; but if such report shows that any part of the crude petroleum so reported remains unsold, then as to such portion remaining unsold, the market price of the crude petroleum on the first business day after said tenth day of the month following the month covered by such report, shall be fixed as the assessed value of such portion of the crude petroleum unsold and the total amount of the tax to be reported as the assessment on such report shall be the total of the assessments made on such sold and unsold crude petroleum.

The State Tax Commission in making its assessments shall take into consideration transportation charges.

Sec. 7. Every person, firm, corporation or association required to make report as provided in Section 5 hereof, shall be responsible and liable for the taxes as herein set forth on all crude petroleum so received by it, and shall collect from the producer in either money or crude petroleum the taxes imposed under the provisions of this [fol. 26] act; but, if collection is in crude petroleum, such transporter is authorized and empowered to sell the same, and pay said taxes by check or cash to the State Tax Commission or Sheriff, as provided in this act.

Sec. 8. The State Tax Commission may require reports on blanks prepared by it from all producers and transporters of crude petroleum, in addition to the reports above provided for, as it may deem necessary, from time to time.

Sec. 9. Any person, firm, corporation or association, required to make reports or collect and pay the taxes hereunder, failing to pay such taxes, penalty or interest, after becoming delinquent; or failing to make any report, required by this act, for thirty days after the date upon which the same is required by this act to be made; or failing for thirty days after engaging in the transportation of crude petroleum, as set out herein, to register as required hereby, shall be deemed guilty of a misdemeanor, and on conviction shall be fined fifty dollars ($50) for each day of such failure, to be recovered by indictment or civil action, and a false report shall be deemed as a failure to report under this act.

Sec. 10. All Acts and parts of acts in conflict herewith are hereby repealed.

Sec. 11. Whereas, the law under which the tax on crude petroleum is collected is difficult of administration, and much unnecessary work is required in the collection of taxes and making of reports and whereas, another quarter will be due on the first day of March 1918, an emergency is declared to exist and this act will become effective upon its approval by the Governor.

Approved March 29, 1918.

[fol. 27] IN CIRCUIT COURT OF FRANKLIN COUNTY

SUMMONS AND SHERIFF'S RETURN

The Commonwealth of Kentucky to the Sheriff of Franklin County Greeting:

You are commanded to summon W. H. Shank, Auditor, &c., to answer in 10 days after the service of the summons, a petition in Equity filed against him in the Franklin Circuit Court by Swiss Oil Corporation and warn him that upon failure to answer, the petition will be taken for confessed, or he will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, Kelly C. Smither, Clerk of said Court, this 11th day of April, 1924.

Kelly C. Smither, Clerk, by —— ——, D. C.

The Sheriff's return on the foregoing summons is in words and figures as follows:

Executed by delivering to W. H. Shanks Auditor of Public Accounts for Kentucky a true copy hereof, This April 11, 1924.

John M. Lucas, S. F. C., by R. Carey Graham, D. S.

[fol. 28] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

NOTICE OF MOTION FOR WRIT OF MANDAMUS—April 11, 1924

To W. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky:

You will take notice that the Swiss Oil Corporation has filed a petition in the Franklin Circuit Court against you asking upon the grounds therein stated for a Writ of Mandamus commanding you to draw a warrant as Auditor of Public Accounts, upon the State Treasurer in favor of the Swiss Oil Corporation for the sum of $8,944.64 taxes erroneously paid into the State Treasury by it under

an invalid and unconstitutional statute; and further commanding you to draw your warrant upon the State Treasurer in favor of a Receiver to be named by the Franklin Circuit Court for the aggre- [fol. 29] gate sum of $327,704.24 in full of all taxes illegally and wrongfully collected under said invalid statute for a period of time beginning April 1st, 1922 and ending April 1st, 1924, to be refunded and distributed back to the persons and corporations entitled to same under the order and directions of the court.

You will further take notice that the Swiss Oil Corporation will on its own behalf, and on the behalf of all persons who are similarly situated and who are entitled to share in the refund and distribution of said illegal tax, make a motion before the Franklin Circuit Court in said action on Tuesday, April 22nd, 1924, that the court issue the writ of mandamus against you in accordance with the prayer of said petition. Said motion will be made in open court in the Circuit Court room at Frankfort, Kentucky, at the regular motion hour on said day, or as soon thereafter as the court will entertain said motion.

Given under our hand this April 11th, 1924.

Swiss Oil Corporation, by E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys.

The Sheriff's return on the foregoing notice is in words and figures as follows:

Executed by delivering to W. H. Shanks, Auditor of Public Accounts for the State of Kentucky, a true copy hereof, This April 11, 1924.

John M. Lucas, S. F. C., by R. Carey Graham, D. C.

[fol. 30] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MOTION FOR WRIT OF MANDAMUS—Filed Apr. 25, 1924

Comes the plaintiff, Swiss Oil Corporation, upon its own behalf and upon behalf of all other persons and corporations who have a common interest with it in the prosecution of this action and pursuant to notice given to the defendant on April 11th, 1924, of its purpose so to do, and moves the court to issue a writ of mandamus herein commanding and directing the defendant, W. H. Shanks, Auditor of Public Accounts to draw a warrant upon the State Treasurer in favor of the Swiss Oil Corporation for the sum of $8,944.64 taxes erroneously paid into the State Treasury by it within the two years next before the filing of Plaintiff's petition, which taxes were paid under an invalid and unconstitutional statute: and further commanding and directing said defendant, W. H. Shanks, Auditor of Public Accounts to draw a warrant upon the State Treasurer in favor of the Master Commissioner and Receiver of the Franklin Circuit Court for the further sum of $318,789.60 in full of all taxes

erroneously paid by all other persons and corporations similarly situated within the two years next preceding the filing of the plaintiff's petition and which sum is the aggregate amount of taxes collected and paid into the State Treasury by all the transporters of crude petroleum in this State (other than the plaintiff) under said invalid statute during said period of time.

[fol. 31] The plaintiff files as part of this motion the notice given the defendant bearing the officer's return.

Given under our hand this the 22nd day of April, 1924.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Plaintiff.

In Circuit Court of Franklin County

[Title omitted]

Submission of Cause on Demurrer and Motion to Strike—May 3, 1924

Came the defendant, by attorney, and filed a general demurrer to the plaintiff's petition and without waiving said demurrer filed motion to strike from said petition certain indicated parts therein and this cause is submitted on said demurrer and motion to strike.

[fol. 32] In Circuit Court of Franklin County

[Title omitted]

Motion to Strike—Filed May 3, 1924

Now comes the defendant and moves the court to strike out all that part of Plaintiff's petition, beginning with and including the word "Plaintiff" in the first line on page ten, and down to and including the word "suits" in the eighth line on pages eleven of the petition also all that part of the petition beginning with and including the word "and" in line fourteen on page eleven down to and including the word "thereto" in line twenty-five of the petition.

Frank E. Daugherty, Attorney General.

[fol. 33] In Circuit Court of Franklin County

[Title omitted]

Demurrer to Petition—Filed May 3, 1924

Comes the defendant, W. H. Shanks, Auditor and without waiving his motion to strike, demurs, to the petition because it does not state facts sufficient to constitute a cause of action.

Frank E. Daugherty, Attorney General.

[fol. 34] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MINUTE ENTRY—May 10, 1924

Came plaintiff, by attorney, and filed Amended and supplemental petition herein.

Also filed brief for plaintiff.

[fol. 35] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

AMENDED AND SUPPLEMENTAL PETITION—Filed May 10, 1924

The plaintiff, Swiss Oil Corporation, for amended and supplemental petition herein states that on April 11, 1924, the day on which it filed its petition herein it made application upon and demanded of the defendant, W. H. Shanks, Auditor of the State of Kentucky, that he draw his warrant upon the treasurer of the State of Kentucky, payable to the Receiver of the Franklin Circuit Court for the sum of three hundred twenty-seven thousand, seven hundred and two dollars, twenty-five cents ($327,702.25) being the aggregate amount of state taxes exacted of and collected from producers and owners of crude oil and paid into the State Treasury between April 1, 1922 and April 1st, 1924. Said application and demand was made upon said defendant by plaintiff by its attorneys both verbally, and by writing delivered to said defendant at the same time, a copy of which writing is filed herewith as part hereof.

In said application and demand plaintiff advised and notified said defendant that it had prepared and was filing in this court its petition in its own behalf and for and on behalf of all others in similar situation from whom the said production tax had been exacted and collected, in which it was sought to have the Receiver of the Court collect and receive the amount of such taxes, and distribute same under proper proceedings and orders of Court to the persons rightfully entitled thereto.

[fol. 36] Notwithstanding such application and demand said defendant has failed and refused and still fails and refuses to issue or draw such warrant or to recognize the right of this defendant or of any of the others for whom it sues to recover any part of such taxes.

Plaintiff says that it is proper and necessary that the defendant be required to issue his warrant for the said amount, and that the Court in one action afford relief to and adjust the rights of the parties entitled to recover such taxes for the following reasons, viz:

(a) Because the said parties have a common or general interest in the subject matter and are too numerous to be brought before the Court within a reasonable time.

(b) Because the amount of such taxes constitutes a trust fund equitably belonging to said parties, and which should be administered by the Court.

(c) Because the ascertainment of the rights of the parties thereto will involve the examination of numerous and involved accounts, and comparison and adjustment of run tickets, division orders, and other matters with the monthly reports of transporters to the State Tax Commission reporting simply the aggregate volume and value of oil transported. In order that justice may be done to all, such rights must be adjusted in one action.

(d) Because separate and independent actions by such taxpayers to recover the amounts respectively due them would involve the duplication of such extensive and costly accounting and cause a multiplicity of suits to be brought, at an exhorbitant and unnecessary cost and annoyance to both taxpayers and the State.

[fol. 37] Wherefore plaintiff prays as in its petition.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Plaintiff.

Rec'd copy of above amended and supplemental petition—May 8, 1924.

Frank E. Daugherty, Atty. General, by Chas. F. Creal, Asst. Atty. General.

Sworn to by Thomas A. Combs. Jurat omitted in printing.

[fol. 38] EXHIBIT TO AMENDED AND SUPPLEMENTAL PETITION

April 11th, 1924.

Hon. W. H. Shanks, Auditor of Public Accounts, Frankfort, Kentucky.

DEAR SIR: The undersigned, Swiss Oil Corporation, respectfully represents to you that it is and was at all the times hereinafter mentioned a producer of crude petroleum oil in the State of Kentucky, and it claims the right to represent all other producers of crude petroleum oil in the State of Kentucky and who were engaged in such production during the times hereinafter mentioned and who are too numerous to join in this application or demand or to join in a proper court proceeding or to join any action in court to protect their rights, and who have been required to pay and have paid into the Treasury of the Commonwealth of Kentucky, under the invalid and unconstitutional statute hereinafter designated, various sums and amounts as an oil production tax. The sums and amounts so paid by said

claimants were covered into the Treasury of the Commonwealth of Kentucky between April 1st, 1922 and April 1st, 1924; that during said time the said persons and corporations were engaged in producing crude petroleum oil and delivered same to the Cumberland Pipe Line Company and others as transporters to be transported to markets and to storage tanks situated outside of Kentucky. The several pipe line companies operating in Kentucky during said time were required by the terms of said law to report to the Kentucky State Tax Commission the quantity of oil received and transported by it or them during the previous months.

[fol. 39] That said transporters made monthly reports to the State Tax Commission as required by terms of said statute and paid to the State of Kentucky through the State Tax Commission the sums and amounts hereinafter stated. That as of March 1st, 1922 and up to March 1st, 1924, the said several pipe line companies (designated in the statute as transporters) made the required monthly reports to the State Tax Commission showing the number of barrels of oil received during each of the several months embraced in said period; and thereupon the State Tax Commission fixed a valuation on said oil and the pipe line companies paid to State of Kentucky through the State Tax Commission the taxes imposed by said statutes. The aggregate amount of taxes paid by the transporters into the State Treasury on the valuation fixed by the State Tax Commission for each of said months is shown in an itemized statement which is attached hereto and made part hereof marked "A." It says there was paid by the several pipe line companies, as transporters of crude petroleum, into the State Treasury of the State of Kentucky, for and on behalf of all of the said producers of oil during said period of time the aggregate sum of $327,702.25 as shown by said itemized statement.

The undersigned respectfully represents and claims that the exaction and collection of the said sum, and of all thereof as a tax against said oil producers and their said property, was and is illegal and without authority of law. That the statute under which the said tax was imposed was and is void because it is in contravention of the constitution of Kentucky and of the United States.

The undersigned further represents to you that it has prepared a petition in its own behalf, and for and on behalf of all the oil producers of the State of Kentucky, whose interest are identical with [fol. 40] its interest, to be filed in the Franklin Circuit Court asking, among other things, that a Receiver be appointed to receive and distribute back to the rightful owners thereof said illegal and void taxes.

Wherefore you are requested and demanded to draw your warrant upon the Treasurer of the State of Kentucky, payable to the Receiver of the Franklin Circuit Court, to be designated in said action for the sum of $327,702.25, the aggregate amount of taxes collected from all transporters of crude petroleum and covered into the State Treasury within the period of time above mentioned.

Yours respectfully, Swiss Oil Corporation, by E. L. McDonald, Treasurer, for and on behalf of all oil producers in this Commonwealth who have a common interest with it in the prosecution of this demand. E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Swiss Oil Corporation.

[fol. 41] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

SUBMISSION OF CAUSE ON MOTION TO STRIKE AND DEMURRER TO AMENDED PETITION—Sept 25, 1924

Came the defendant, by Attorney and filed a written motion and moved the Court to strike from plaintiff's petition certain indicated parts therein, and without waiving said motion filed a demurrer to the amended petition; upon which motion and demurrer the Court takes time.

[fol. 42] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MOTION TO STRIKE—Filed Sept. 25, 1924

Now comes the defendant and moves the court to strike out all that part of plaintiff's original petition beginning with the word "the" in the fifth line on the third page, down to and including the word "tax" in the twel-th line on the fourth page, and on this motion he prays the judgment of the Court,

Frank E. Daugherty, Attorney General.

[fol. 43] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

DEMURRER TO AMENDED PETITION—Filed Sept. 25, 1924

Comes the defendant and demurs to the amended petition herein because same does not state facts sufficient to a cause of action.

Frank E. Daugherty, Atty. Gen., Attorney for Defendant.

[fol. 44] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MEMORANDUM OPINION—Filed Sept. 27, 1924

The importance of this case prompts me to suggest in writing, the basis of my conclusion.

Whilst I am not unmindful of the Raydure case which says that this tax may be upheld as a license tax, and also Associated Producers Co. vs. Estill Co., tending to the same conclusion, I do not feel that I am going counter to the holdings of the Court of Appeals, in hold-

ing as I now do that this 1% of the value of all oil transported, which is charged to and collected from the carriers was intended as a property tax and not a license tax.

If it was intended as a property tax, and was to be in lieu of all other taxes, then it occurs to me that unless the exemption from all other taxes can prevail the whole scheme fails: Manifestly the intended property tax of 1% was so dependent upon the exemption from all other taxes that the Legislature would not have fixed the assessment at 1% except upon the idea of such exemption.

Being intended by the Legislature as a property tax, and containing the exemption referred to, if it is at variance with Sec. 171 of the Constitution and cannot for that reason be upheld as a property tax, it certainly ought not to be sustained as a license tax affording no exemption when an intention upon the part of the legislature to fix such tax without the exemption may not fairly be imputed [fol. 45] to that body.

If it is a production or property tax, and not a license tax, to hold that it and the ad valorem tax may both be sustained would plainly be double taxation.

The history and language of 1917 and 1918 Acts, on the subject of whether this was intended to be a license tax or a property tax, leaves little for guess work.

It results that plaintiff, Swiss Oil Corporation, should have judgement for $8,944.63.

The relief sought by way of recovery on behalf of others similarly situated, but not parties to this suit, is denied.

Ben G. Williams, C. J. F. C.

[fol. 46] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

JUDGMENT—Sept. 27, 1924

This cause this day coming on to be heard upon the plaintiff's petition and amended petition, the several exhibits filed herewith, and upon the general demurrer to the petition and motion to strike made by the defendant, and upon which the Court heard an oral argument, by counsel, for plaintiff and defendant, and both sides in addition filed briefs in support of their several contentions; and this cause having been under submission and advisement for some time, and after due consideration and being sufficiently advised the court filed a written opinion in which it directs that the Defendant's demurrer to the petition be over-ruled for the reasons stated in the opinion; and that defendant's motion to strike all that portion of the Plaintiff's petition which seeks to recover for persons, corporations and associations similarly situated, be sustained, and directing that a judgment be entered in accordance with the views expressed in the opinion in the event the parties declined to plead further.

Came the plaintiff and defendant by their counsel in open court and declined to plead further after the written opinion expressing the views of the Court had been filed.

It is therefore, considered and adjudged by the Court that the allegations of the petition be taken as confessed by the defendant; [fol. 47] and for reasons expressed in the written opinion which is ordered filed and made a part of this record, the Court finds that the Act of the General Assembly in 1918 being Chapter 122 Acts 1918, now section 4223c-1 Kentucky Statutes, and Act of the General Assembly at its extraordinary Session in 1917 being Chapter 9 page 40 of the Acts of 1917, are *in* invalid, unconstitutional and void; and that neither of said Acts or Statutes furnished any valid authority for the assessment and collection of the tax imposed thereby or thereunder; and that said taxes were paid by plaintiff, Swiss Oil Corporation, under compulsion, and under said illegal and void statutes, and without warrant of law, and when no such taxes were in fact due. It is, therefore, considered and adjudged by the Court that it was, and is, the duty of the defendant, W. H. Shanks, Auditor of Public Accounts, under section 162 Kentucky Statutes to draw a warrant on the State Treasurer in favor of the Swiss Oil Corporation for the sum of Eight Thousand Nine Hundred and Forty- four and 64/100 Dollars ($8,944.64) the total taxes wrongfully assessed and paid by it into the State Treasury within the two years next preceding the date of its demand; that the defendant, Shanks as Auditor of Public Accounts for the Commonwealth of Kentucky is hereby directed to forthwith draw a warrant on the State Treasurer in favor of the Swiss Oil Corporation for the said sum of $8,944.64 the total tax wrongfully collected from the said tax-payer and for which it is clearly entitled to have restored or refunded.

To so much of this judgment as declares the Acts of 1917 and 1918 above mentioned unconstitutional and void, and directs W. H. Shanks, Auditor of Public Accounts to draw his warrant in favor of the plaintiff for the sum of Eight Thousand Nine Hundred Forty-four and 64/100 ($8,944.64) the defendant W. H. Shanks, Auditor, objects and excepts and prays an appeal to the court of Appeals, which is granted.

[fol. 48] On the other questions presented by the petition i. e. that the plaintiff be authorized to maintain an action for and on behalf of all other persons, corporations and associations who have been wrongfully required to pay taxes within the two years next before the making of demand by plaintiff on their behalf, and to recover said taxes for them on the theory that the question involved is of such a common or general interest as will authorize one to sue for all, the Court is in doubt; but as the law provides a method by which any aggrieved tax-payer may have relief by making a seasonable demand the Court is unwilling to tie up so large a sum of money until the validity or invalidity of the Statutes in question have been finally determined by the States Highest Court. The Court, therefore, adjudges that there is not such a common or general interest involved as entitled plaintiff to maintain an action for and on behalf of all persons who have been wrongfully compelled to pay

taxes under said Statutes, or as will authorize this Court to make a reference to its Commissioner and Receiver to receive such taxes wrongfully collected and held in the Treasury, or to ascertain and report the several amounts due such tax-payers. It is, therefore, adjudged by the Court that the defendant's motion to strike be sustained; and that its right to maintain said action for and on behalf of all other tax-payers similarly situated be denied. To this latter portion of the Court's order the plaintiff, Swiss Oil Corporation, objects and excepts and prays an appeal to the Court of Appeals which is allowed.

B. G. Williams, Judge Franklin Circuit Court.

[fols. 49 & 50] IN CIRCUIT COURT OF FRANKLIN COUNTY

CLERK'S CERTIFICATE

COMMONWEALTH OF KENTUCKY,
County of Franklin, ss:

I, Kelly C. Smither, Clerk of the Franklin Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing Forty-five (45) pages contain a full true and complete transcript of the record and proceedings in the case wherein Swiss Oil Corporation, is plaintiff, and W. H. Shanks, Auditor for the Commonwealth of Kentucky, is defendant. No. 31986, an action lately pending in the aforesaid court as the same appears of record and now on file in my office.

Witness my hand as Clerk aforesaid, this 2nd day of October, 1924.

Kelly C. Smither, Clerk Franklin Circuit Court, by Nell Sullivan, D. C.

Transcript fee, $18.00.

[fol. 51] IN COURT OF APPEALS OF KENTUCKY

SWISS OIL CORPORATION, Appellant,

vs.

W. H. SHANKS, Auditor of Public Accounts for the Commonwealth of Kentucky, Appellee

STATEMENT OF APPEAL—Filed Oct. 3, 1924

1. The name of the appellant and the appellee is correctly stated in the caption.

2. The portion of the judgment of the Franklin Circuit appealed from is dated September 27th, 1924 and denies appellant (plaintiff below) the right to make demand and to maintain action on behalf of all tax payers similarly situated on the ground that the facts do

not show such a common or general interest as will authorize one to sue for all; and further refuses to make a reference to the Commissioner and Receiver of the Franklin Circuit Court to ascertain and report the several amounts due such taxpayers for taxes wrongfully assessed and collected, when no such taxes were in fact due. The portion of the judgment appealed from appears on pages 44 [fol. 52] and 45 of the record.

3. The appeal having been granted by the lower court on motion of the appellant, and having been prosecuted within the time fixed by law for perfecting such appeals, no summons is necessary or requested.

4. The transcript of the record filed herein contains a full and correct copy of the entire record which includes all pleadings, exhibits, motions, orders, the court's opinion and the judgment.

E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Appellant, Swiss Oil Corporation.

[fol. 53] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY

Came the appellee, by Counsel, and filed motion for a Cross-appeal, which motion is submitted.

[fol. 54] [File endorsement omitted]

[fol. 55] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

MOTION OF W. H. SHANKS FOR CROSS-APPEAL—Filed Oct. 22, 1924

Now comes the appellee, W. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky, and moves the Court to grant him a cross-appeal herein from so much of the judgment of the Franklin Circuit Court, as overrules demurrer to the petition and adjudges and declares that the Act of the General Assembly in 1918, being Chapter 122, Acts 1918, now Section 4223-1 Kentucky Statutes, and the act of the General Assembly at its Extraordinary Session in 1917, being Chapter 9, page 40 of the Acts of 1917, are invalid, unconstitutional and void, or that adjudges and grants appellant (plaintiff) any relief prayed for in its petition; and that said cross-appeal be heard and considered on the transcript of the record filed by appellant, Swiss Oil Corporation, herein, same being a full and correct copy of the entire record in the Court below.

W. H. Shanks, Auditor Public Accounts for the Commonwealth of Kentucky, by Frank E. Daugherty, Attorney General of Kentucky.

[fol. 56] IN COURT OF APPEALS OF KENTUCKY

ORDER SUSTAINING MOTION FOR CROSS-APPEAL—Oct. 24, 1924

The Court being sufficiently advised, the motion of the appellee for a Cross Appeal is sustained, and a Cross Appeal is granted.

IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—Oct. 24, 1924

Parties filed joint motion to docket, advance and submit.

[fol. 57] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

JOINT MOTION TO DOCKET, ADVANCE, AND SUBMIT—Filed Oct. 24, 1924

It is stipulated and agreed by the parties that as the question involved on this appeal is the constitutionality of the Act commonly known as the "Oil Production Tax Law," and inasmuch as a public question is involved in which the oil interests of the State as well as the public are interested, that this case, under rule 6, should be docketed, advanced and submitted, so that the question involved may have a speedy determination.

Come the parties, therefore, and move the Court to docket, advance and submit the above appeal with leave to both parties to file their briefs within the next ten days; and with leave to the appellant to enter its motion herein for an oral argument.

Respectfully submitted, E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Appellant, Swiss Oil Corporation. Frank E. Daugherty, Attorney General, by Chas. F. Creal, Asst. Atty. Genl., for Appellee.

[fol. 58] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—Oct. 28, 1924

The Court being sufficiently advised, the joint motion of parties to docket, advance and submit is sustained, and this case is ordered to be submitted.

[fol. 59] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—Nov. 14, 1924

Came the appellant, by Counsel, and filed notice and statement for an oral argument, which motion is submitted.

[fol. 60] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

APPELLANT'S MOTION FOR ORAL ARGUMENT—Filed Nov. 14, 1924

Comes the appellant, Swiss Oil Corporation, and moves the Court for an oral argument in the above case because it says:

(1) That the questions presented on the appeal involve the constitutionality of the Acts of the General Assembly 1917 and 1918, commonly known as the "Oil Production Tax Law"; and are sufficiently novel and important to require an oral argument.

(2) The lower Court held said statutes to be unconstitutional, and allowed the appellant to recover the taxes paid within the two years next preceding the filing of the petition. The effect of this decision will be that the Pipe Line Companies (who are made collectors of the tax under the statute) will withhold collections made [fol. 61] by them until the validity of said statutes is finally determined by this Court. Thus, a large portion of the State's revenue will be arrested while this case is pending on appeal.

(3) That the statutes assailed produce annually large sums of revenue, as the recovery allowed by the lower court for two years tax will aggregate approximately $375,000.00. The questions therefore involved on the appeal are of such public interest that the Appellate Court should have the benefit of an oral argument in addition to the briefs.

(4) It suggests that the questions involved on the appeal are of such importance, that if it is not incompatible with the business of the Court, that the whole Court should sit and hear the oral argument.

(5) It says that briefs have heretofore been filed by counsel for appellant and appellee; and a stipulation has also been filed requesting the Court to docket, advance and submit this case for substantially the same reasons expressed herein.

All of which is respectfully submitted.

Swiss Oil Corporation, by E. L. McDonald, O'Rear, Fowler & Wallace, Attorneys for Appellant.

Copy of motion received 10/12/24.
Frank E. Daugherty, Atty. Genl., by Chas. F. Creal, Asst. Atty. Genl.

[fol. 62] IN COURT OF APPEALS OF KENTUCKY

ORDER OVERRULING MOTION FOR ORAL ARGUMENT—NOV. 14, 1924

The Court being sufficiently advised, it is considered that the motion of the appellant for an oral argument, be and the same is overruled.

[fol. 63] IN COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—NOV. 18, 1924

Came the Appellant, by Counsel, and filed Statement and motion for a reconsideration of its motion for an oral argument.

[fol. 64] IN COURT OF APPEALS OF KENTUCKY

ORDER GRANTING MOTION FOR ORAL ARGUMENT—NOV. 25, 1924

The Court being sufficiently advised, the order heretofore entered herein, overruling the motion of the appellant for an oral argument, is now set aside, and an oral argument is granted, and set for hearing on Friday, December 12th, 1924, at ten O'Clock A. M.

[fol. 65] IN COURT OF APPEALS OF KENTUCKY

ARGUMENT AND SUBMISSION—Dec. 12, 1924

This case coming on to be heard was argued by Assistant Attorney General, Charles F. Creal, for the appellee, and Judge Edward C. O'Rear for the appellant and submitted.

[fols. 66 & 67] IN COURT OF APPEALS OF KENTUCKY

JUDGMENT—March 20, 1925

The Court being sufficiently advised, it seems to them the judgment herein is erroneous in part.

It is therefore considered that the judgment on the original appeal be affirmed, and the judgment on the Cross appeal reversed, and

cause remanded with directions to the lower Court to dismiss the petition, which is ordered to be certified to the said Court.

It is further considered that the appellee recover of the appellant his costs herein expended.

(Whole Court sitting; Judge Dietzman dissenting.)

[fol. 68] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—March 20, 1925

By this action the Swiss Oil Corporation attacks the validity of section 4223-e-1 of the Kentucky Statutes, which imposes a tax upon oil producers, and seeks to recover $8,944.64 paid by it to the state thereunder, and also to require the Auditor to make similar refunds to all other producers of like taxes paid by them.

[fol. 69] The lower court refused to permit plaintiff to sue for and on behalf of other oil producers, but held the act invalid and awarded plaintiff a judgment requiring the Auditor to issue to it a warrant for the amount paid by it. Complaining of so much of the judgment as refused to permit it to sue for and on behalf of other oil producers, plaintiff prosecuted this appeal, and the Auditor has cross appealed from that part of the judgment holding the act invalid and ordering a refund of the $8,944.64.

The single question presented by the direct appeal may be disposed of very briefly. Section 162 of the statutes empowers the Auditor to issue his warrant on the treasury for taxes improperly paid, "in behalf of the person who paid the same." Section 163 provides he shall not issue his warrant for any money improperly paid for taxes "unless application be made in each case within two years from the time when such payment was made."

Hence it is clear that the Auditor cannot issue his warrant for a [fol. 70] refund of taxes improperly paid unless and until application is made therefore "in each case," and "in behalf of the person who paid the same." This necessarily implies, as reason dictates, that the application for a refund must be made by the party entitled thereto, or someone authorized by him to make such demand, and that each claim shall be made separately.

It is therefore clear that the demand made by the plaintiff upon the Auditor for the aggregate claimed to be due it and others for whom it had no authority to act, was not such a demand as the statute contemplates.

Then again, the claims of the different producers for refund of taxes paid by them are necessarily separate and individual, and not of such character as that one of them may sue for the benefit of all under section 254 of the code of practice, and by reason of which appellant claims the right so to do. This question is conclusively settled against the appellant in Union Light & Power Co.

v. Mulligan, 177 Ky. 670, 197 S. W. 1081; Batman v. Louisville Gas & Electric Co., 187 Ky. 659, 220 S. W. 318; Barriger v. Louisville Gas & Electric Co., 196 Ky. 268, 244 S. W. 690, and upon [fol. 71] authority of those cases, the judgment upon the direct appeal is affirmed.

Section 4223c-1 of the statutes, under which the taxes, that appellant seeks to compel the Auditor to refund, were laid and collected, is an act of the 1917 session of the legislature, as amended at the 1918 session. As thus amended it was construed and declared valid by this court in Raydure v. Board of Supervisors, 183 Ky. 84, 209 S. W. 19, and again in Associated Producers Co. v. Supervisors, 202 Ky. 538, — S. W. —.

It is insisted however for appellant that the question of the act's validity was not present in either case, and that these declarations of validity are therefore dicta and not controlling. Whether or not this is true is the first question for decision on the cross-appeal.

In the Raydure case, the Board of Supervisors had assessed for advalorem taxation several oil leases owned by him, except five acres surrounding each producing well. He contested their right to do so upon three grounds, namely: (1) That oil leases are not of property within the meaning of our taxing laws, (2) if so, their assessment against him, a non-resident, was discriminative and illegal [fol. 72] because there was no provision for taxing same in the hands of a resident of the state, and (3) that his liability for a production tax on his producing wells under section 4223c-1 supra exempted him from liability for tax of any and all kinds upon the leases upon which these producing wells were located.

This latter contention, presented not only by brief of counsel and upon the oral argument but also by the agreed statement of facts upon which the case was tried in the courts below, clearly tendered to this court for decision both the validity and the meaning of the act levying the so-called production tax, since obviously unless that act was valid and actually allowed the claimed exemption, appellant's contention was unsound. So after deciding that there was no merit in either of Raydure's first two contentions, the court took up Section 4223c-1 considered its validity under Section- 171 and 181 of the state constitution, which involved the character of the tax it imposed, and whether or not it did in fact, as claimed by Raydure, exempt his leases from assessment for ad valorem taxes.

More than six printed pages—nearly half of the opinion—are devoted to a discussion as to the validity and meaning of that section [fol. 73] of the statutes. Many opinions pertinent to those questions, from this and other courts, were reviewed, and, after a most careful consideration of both questions, from every possibly angle, the conclusion was reached that while the act was valid, as contended by the appellant, it did not grant the claimed exemption, although it provided that the payment of the tax thereby imposed should be "in lieu of all other taxes on wells producing said crude petroleum."

If the court had stopped here, surely no one would ever have thought of calling its decision of either of these questions obiter. But the court went farther and also held that if the provision

quoted above was construed to grant an exemption from advalorem taxes, it would render the whole act violative of section 171 of the constitution, and void.

By having decided not only that the act did not grant the claimed exemption, but also that if it did it would have been unconstitutional, it is now apparent that the court need not have decided the question of the validity of the act, and it is solely because the court did not waive that question that it is now insisted its decision thereof is dictum. Despite some apparent plausibility, this contention is, we feel sure, wholly unsound.

[fol. 74] While statements made in an opinion that are not necessary to the decision of the question under consideration by the courts are dicta, it does not follow by any means, and is not true, that the decision of either of two questions, presented by the record and in the arguments, is obiter simply because a decision of one of them disposed of the case and rendered a decision of the other unnecessary.

Despite some conflict in the authorities as to what is and what is not dictum in other circumtsances, the rule is well settled, upon both reason and authority, that:

"Two or more questions properly arising in a case under the pleadings and proof may be determined, though either one would have disposed of the entire case upon its merits without the other, and neither holding is a dictum so long as it is properly raised and determined. Nor can an additional reason for a decision, brought forward after the case has been disposed of on one ground, be regarded as dictum."

7 R. C. L. 1005; King v. Pauly, 159 Cal. 549, 115 Pac. 210, Ann. Cas. 1912C, 1244 and note.

McFarland v. Bush, 94 Tenn. 538, 29 S. W. 899, 45 A. S. R. 760, 27 L. R. A. 662.

[fol. 75] Chicago, B. & Q. R. Co. v. Appanoose Co., 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117.

It results therefore that the decisions in the Raydure case, that the act of 1917 as amended in 1918 is a license and not a property tax, and as such a valid exercise of legislative authority conferred by section 181 of the state constitution, are not dicta but authoritative decisions of the court, and binding unless and until overruled.

The Associated Producers Co., in its case, claimed an exemption from ad valorem tax on the five acres surrounding each producing [fol. 76] well, under section 4223c-1, supra as construed in the Raydure case. As the opinion in the Raydure case had expressly refrained from deciding whether or not section 4223c-1 exempted five acres of land around a producing well for the reason that that question was not presented by the record, it was manifest that it was not intended that that question should be concluded or affected by anything said therein.

It necessarily resulted therefore that the particular statement therein upon which the Associated Producers Co.'s claim of exemption was based did not and could not support its claim, and the court had no trouble in reaching that conclusion, and that statement

was withdrawn. It then became necessary, just as in the Raydure case, to decide whether or not the act itself granted the claimed exemption, and in disposing of that question the validity and meaning of the act were reconsidered by the whole court, and the conclusion again reached, as in the Raydure case, that it was valid under section 181 of the constitution, because it was a license upon the business of producing oil in the state, and that the provision therein that such tax should be "in lieu of all other taxes on the wells producing said crude petroleum" was intended to mean, and means, that there would be no other license or occupation tax thereon.

Judge Clay, who had not participated in the decision of the Raydure case, dissented, not because he did not agree with the conclusion of either case, but because, from a consideration of the his- [fol. 77] tory of the legislation, he did not believe that the act would have been passed by the legislature as construed by the court in both cases, and that it was, for that reason, unconstitutional.

It follows that the court's decision in that case, that the act is valid—as well as the reasons upon which that conclusion is rested—is not dictum, for the same reasons that the like decisions in the Raydure case were not of that character.

It is therefore clear that this court has twice had presented to it for decision, and each time, after the most careful consideration, has decided the act in question valid, and that it did not exempt from ad valorem taxes the whole or any part of an oil lease, and imposed only a license or occupational tax upon the business of producing oil in this state.

In addition, both state officials and oil producers recognized the Raydure case, for more than five years and until the institution of this action, as a conclusive adjudication by this court that section 4223c-1 was valid, and that it, at least, did not exempt the whole, if any part, of an oil lease from ad valorem taxes. That this is true there can be no manner of doubt, since it is matter of common knowledge, and stated as such by counsel for appellant in brief, that the oil producers of the state, believing the court had mis- construed the legislative intention in the Raydure case, went before the legislature at its 1922 and 1924 sessions, and attempted, with- [fol. 78] out success, to procure a modification by the legislature of the effect of that decision, subsequently reaffirmed in the Associated Producers Co. case.

What the oil men and administrative officials of the state may have believed the act meant prior to the court's construction thereof, is now relatively unimportant. What they have done since is of much more importance, since it has a direct bearing, under the stare decisis doctrine, upon whether that construction, if merely doubtful, should be abandoned.

That the legislative meaning, by the clause in the act "in lieu of all other taxes on wells producing said crude petroleum," upon which this whole controversy hangs, is not free from doubt, is clear, and that it is fairly susceptible of the construction that it does not include the entire lease, despite the fact the words "in lieu of" were

substituted for "in addition to" before the act was passed, is conceded in the dissenting opinion. It is no easier now than upon either of the two former considerations of the question to determine just what the legislature meant by what it said. The history of the legislation, that is said to make that meaning clear, was considered in that connection upon both of those occasions, and was the cause of a whole court consideration, and the basis of a dissent upon the last one.

These facts are quite sufficient, it would seem, to show that the legislative meaning by the above clause was a matter of such doubt as to warrant the court's adoption of a construction that would [fol. 79] render the act valid, as it twice has done, rather than one that would have convicted the legislature of merely wasting its time, as it is now asked to do.

But even if this were not true, we are yet of the opinion that any reasonable consideration of the stare decisis doctrine demands that the court's construction of the act, since reaffirmed, shall not now be departed from and those cases overruled because of any lingering doubt of their soundness, after the state finances and the business of the oil producers in the state have been adjusted thereto, and two subsequent legislatures have, at least tacitly, approved such construction by refusing to modify it.

This conclusion disposes of appellant's contentions that the act of 1917 as amended in 1918, and now section 4223c-1 of the statutes, imposes a property tax rather than a license tax, and that it is violative of the state constitution for any of the reasons considered in the two cases supra.

Additional grounds upon which the validity of the act as amended is now attacked are, that: (1) Its subject is not expressed in its title, as required by section 51 of the constitution, (2) it imposes a burden upon interstate commerce, forbidden by the federal constitution, and (3) it violates the due process of law provision of the 14th amendment to that instrument, in that it imposes a tax without affording the taxpayer an opportunity to be heard at any stage of the proceedings.

[fol. 80] We might, as in the Raydure case, dispose of each of these contentions upon its merits, and then show that, even if meritorious, that fact could not affect the decision of this case. We shall, however, for the sake of brevity, confine our discussion to an effort to show that the latter of these propositions is true.

Each of these criticisms is leveled at, and can affect only, the amendment of 1918, and there is, and could be, no criticism of the title of the original act passed in 1917, or any claim that it imposed any burden upon interstate commerce, or that it did not afford the taxpayer ample opportunity to be heard before the tax attached.

The original act imposes, just as does the amendment, a graduated occupational tax, measured by the amount of business done by each and every oil producer in the state. The amendment is simply a re-enactment of the original act, with the latter's administrative features so changed as to make the collection of the tax both more certain and less burdensome upon the taxpayer and the assessing and collecting officials. If any or all of the above contentions are

sound, the amndment would be destroyed, but this would leave the original act in force, and unamended. Precisely the same tax would have been collected from oil producers in either event.

This is a proceeding by such a taxpayer to repossess himself of taxes paid the state, under authority of a statute which permits a refund thereof to him only if the taxes were improperly paid. If it be admitted that the amendment, for any of the reasons assigned is invalid, it simply results that the same taxes paid thereunder, and [fols. 81 & 82] in accordance with the method thereby prescribed, would have been due and payable under the method prescribed for assesment and taxation by the original act, and no matter which method for assessment and collection is approved, the tax is precisely the same, and in neither event is its recovery permissible.

Wherefore the judgment is affirmed upon the direct appeal, and reversed upon the cross appeal, with directions to dismiss the petition.

The whole court sitting, and Judge Dietzman dissenting.

O'Rear, Fowler & Wallace, Frankfort, Ky., E. L. McDonald, Lexington, Ky., for Appellant.

Frank E. Daugherty, Atty. Gen., Frankfort, Ky., Chas. F. Creal, Asst. Atty. Gen., Frankfort, Ky., for Appellee.

Robt. H. Winn, Mt. Sterling, Ky., J. P. Harrison, Monticello, Ky., Amici Curiæ.

[fol. 83] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

DISSENTING OPINION—March 20, 1925

Believing that the majority opinion in this case arrives at a result never contemplated nor intended by the Legislature and that this result works a grave and unmerited injustice upon the oil producing industry of this State, I must respectfully dissent from that opinion.

From the record and from facts judicially known, we gather the following history of the events leading up to the passage of the oil [fol. 84] production tax here in question and of the events which succeeded its passage and which accompanied its interpretation by the administrative officers. Before the outbreak of the World War, oil production in this State had not amounted to very much, but with the coming of that catastrophe and the consequent increase in the price of crude oil, development became very rapid. With development, came questions of taxation theretofore but of little, if any importance. Just how were oil leases and producing wells to be assessed and taxed? Our assessors and taxing officials had had but scant experience with this class of property and they were much perplexed as to just what principle to adopt in such assessment and taxation. After several plans had been tried and rejected, finally an arbitrary method was agreed upon by which the wells and leases were assessed at so much per barrel on the daily production on as-

sessment day. For instance, if the agreed valuation was $1,000.00 per barrel and the production from a particular lease was ten barrels per day on assessment day, the property was assessed at $10,000.00. However, this plan was also not satisfactory because the lease which produced ten barrels on assessment day might in a short time thereafter become bone dry, or on the other hand, through further development might produce one hundred barrels a day. And so the hunt for a satisfactory assessment principle continued until the Legislature met in the special session of 1917 following the adoption of the amendment to Section 171 of the Constitution providing for the classification of property for taxation and for the imposition of varying rates of taxation according to class, a new idea in our taxing laws.

[fol. 85] This session of the Legislature was devoted to revising the tax laws of the State. Among such laws proposed, was one embraced in House Bill No. 49, which with the change hereinafter mentioned was later enacted into the law known now as the "oil production tax law of 1917." House Bill No. 49 as originally drafted so far as pertinent read:

"Every person, firm, corporation or association, engaged in the business of producing oil in this State, by taking same from the earth, shall, in addition to the other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to one per centum of the market value of all oil produced in this State," etc.

In this form, the bill passed the House. When it reached the Senate the oil producers of the State presented a protest to the Committee which had the bill under consideration, contending that this tax added to the ad valorem tax would impose a burden so heavy on the oil business as to destroy it. Out of the investigation developed by this protest, the principle that a tax on oil property measured by its actual production was the most satisfactory tax of all was evolved and it was thought that the amount of tax collected in this way and at this rate would fairly approximate the amount of a tax collected on a fair ad valorem assessment. This principle was agreeable to all concerned, including the Senate Committee, which had the bill in charge, the then Attorney General, the Honorable M. M. Logan, who was advising the Legislature in its consideration of the various [fol. 86] tax bills before it, and the oil producers. Accordingly House Bill No. 49 then before the Senate was amended by striking out the words "in addition to the" which preceded the words "other taxes imposed by law," and substituting the words "in lieu of all" so that the tax imposed was "in lieu of all other taxes on the wells producing said oil imposed by law." As thus amended the Bill passed the Senate and on its return to the House, the amendment was concurred in and the Bill as so amended became law. (Acts 1917, Chapter 9). The Act passed at the 1918 session of the Legislature (Acts 1918, Chapter 122) which superseded the 1917 Act we have been considering and which is the Act under which the oil production tax before us was collected is, when fairly considered, but

a re-enactment of the 1917 Act with the latter's administrative features changed so as to make the collection of the tax less burdensome and more assured. Like the 1917 Act, its parent, the 1918 Act too reads that the oil production tax is imposed "in lieu of all other taxes on the wells producing said crude petroleum."

After the adjournment of the 1917 special session of the Legislature, the Hon. M. M. Logan, at the solicitation of the Governor of the Commonwealth, resigned his office of Attorney General and accepted that of Chairman of the State Tax Commission, created at this special session and entrusted with the administration of the newly enacted tax laws.

[fol. 87] Pursuant to the law as all understood it at the time it was passed, the State Tax Commission proceeded to tax the various oil leases over the State with the oil production tax above mentioned and did not levy any ad valorem taxes on producing property. This state of affairs continued until 1918 when the Board of Supervisors of Estill County undertook to assess for ad valorem taxes certain oil leases of one Raydure. This they did by assessing the acreage in the lease less five acres surrounding each producing well. On the wells and the surrounding five acres, no assessment was made nor tax levied. The right of Estill County so to assess the Raydure leases was promptly challenged. Up to this time no interpretation had been put by the courts on either the 1917 or 1918 Act. By these Acts, the oil production tax was imposed "in lieu of all other taxes on the wells producing the oil." Estill County took the stand that this law did not exempt the entire lease from ad valorem taxes but only "the wells" which, by fair interpretation, meant so much of the surrounding acreage as was necessary to support that well. It had been decided in Wolfe County v. Beckett, 127 Ky. 252; 105 S. W. 447, that oil leases as such were subject to the ad valorem tax. It now became necessary to determine to what extent, if any, they were relieved from such taxation by the oil production tax law. And so the matter came to this court in the case of Raydure v. Board of Supervisors of Estill County, 183 Ky. 84; 209 S. W. 19. After [fol. 88] disposing of some preliminary questions not here pertinent, this court, in that case, next took up the oil production tax law of 1918. Raydure based his defense on this law and the position he took is thus stated by the court:

"In other words, the argument rested on this statute is that when a producing well is found by the lessee of an oil lease the tax on the oil produced from the well exempts from further or other taxation the lease, not only on the particular premises that may be said to be included in the well, but the remainder of the lease, and, of course, if this argument is sound, the leases here sought to be and that were taxed in the lower court are wholly exempt from taxation, although they might have a large value on account of the exclusive privilege conferred by the leases to drill for and produce oil in other parts of the leased premises not reached by the producing wells."

After thus stating appellant's position, the court further said:

"It would also necessarily follow if the position of counsel is well taken that the production tax would be substituted for and take the place of the ad valorem or property tax that we have held the oil leases subject to.

"In considering this contention the first question that naturally suggests itself is, was it the purpose of the Legislature in the enact- [fol. 89] ment of this production tax statute that the tax imposed should be in lieu of the ad valorem or property tax to which the oil lease covering the producing territory was subject, and, if such was the intention of the Legislature, did it, under the Constitution, have the power to provide that a production tax might be in lieu of a property tax to which the property would be subject except for the production tax?"

Considering the questions thus propounded, the court first took up the power of the Legislature to substitute a license tax for an ad valorem tax and decided that under our Constitution the Legislature had no such power. In this, I entirely agree. The court should have stopped there because that was all that was necessary to dispose of the case. But having decided that the Legislature had no power to substitute the license tax for the ad valorem tax, the court proceeded to the perfect non sequitur of "ergo, the Legislature did not intend to make such substitution"; and this on the principle that it is the duty of the court to sustain the constitutionality of legislative acts where possible and to presume that the Legislature intended a constitutional rather than an unconstitutional result. The history of this legislation as I have outlined it is in my judgment a reductio ad absurdum of the application of such principle to the facts of this case.

It is stated, however, that be this as it may nevertheless as the court [fol. 90] did base its decision on this latter ground it must be considered as binding authority on the proposition now before us. Although I will show shortly that the court itself did not so regard its reasoning in this connection, yet I also believe that this proposition advanced is a strained extension of the doctrine of stare decisis. This doctrine is based upon the principle that certainty in law is preferable to reason and correct legal principles. But there is no uncertainty in the administration of law when those seemingly affected by its application have not conducted their affairs in accordance with its so-called mandate but in direct defiance thereto. Such is the case here as I will shortly show. The reason for the rule failing, the rule should not be applied.

As stated though, the court itself did not regard its decision as a binding declaration of the constitutionality of this oil production tax law for after finishing its discussion of the abstract power of the Legislature to levy a license tax on oil production in which abstract discussion I concur, the court said:

"It follows from what has been said that the production tax on the oil produced is separate and distinct from the ad valorem tax to which

the leases are subject, and cannot operate to exempt them from the property tax.

"It will be noticed that according to the agreed state of facts the taxing authorities of Estill County, in determining the value of the leases, excluded from the territory covered by the wells 5 acres sur- [fol. 91] rounding each producing well, and only estimated the value of the leases as covering the remainder of the leased premises. Whether the board of supervisors had the authority under the statute to make this exemption of 5 acres or any number of acres, or whether more acreage should be exempted, we do not feel called on to determine in this case, as it does not appear from the agreed state of facts that Raydure is complaining of the action of the board in exempting 5 acres surrounding each well."

The court expressly not deciding whether or not Estill County had the authority under the oil production tax law to make the exemption of 5 acres it did, how can it be said that the court held this license tax to be valid and binding although its imposition would not carry with it the exemption from the ad valorem tax? As the oil production tax law merely exempted the well it cannot be said that the taxing on an ad valorem basis of so much of the lease as was not fairly included within the term "well" raised any question concerning the validity of the exemption of the well and what was fairly included within that term from ad valorem taxation.

The ratio decidendi of the Raydure case then may be fairly stated as this: The oil production tax is not a substitute for an ad valorem tax to the extent of exempting from taxation so much of an oil lease as exceeds 5 acres surrounding each producing well. In this ratio decidendi I concur.

[fol. 92] The history of events following the decision in the Raydure case supports my view for the taxing authorities headed by the able ex-Attorney General in obedience to the court's mandate proceeded to assess for ad valorem taxation oil leases but continued to exempt from such taxation the oil wells and 5 acres surrounding each of them. They did even this with apologies to the oil industry for what was regarded as a breach of faith.

Two Legislatures passed without any action being taken by the law making bodies on the result of the Raydure case. This does not mean that these Legislatures concurred in any idea which the court may have entertained that the Legislature did not intend by the oil production tax law to substitute the license tax for the ad valorem tax because the substitution had continued to be made by the taxing authorities since then, only the substitution had been partial and not total, i. e. only to the extent of the wells and 5 surrounding acres. Probably after all this was a fair interpretation of the 1918 Act because that Act did not exempt the lease but only the well and what "the well" meant was a matter of interpretation. And the way this court left the discussion in the Raydure case fairly lent color to the proposition that after all it simply decided that the oil leases outside of the 5 acres surrounding each well were subject to the ad valorem tax, which decision did not necessarily carry with it a decision that the wells and 5 acres were also subject to such tax.

With the matter in this shape the passive positions of the Legislatures cannot be fairly said to be more than a concurrence in what was [fol. 93] being done by the taxing authorities under the Raydure case, which was the exempting from ad valorem taxation of wells and their 5 surrounding acres.

In 1924, after the legislative session of that year had adjourned, the case of Associated Producers Company v. Board of Supervisors of Estill County, 202 Ky. 538; 260 S. W. 335, was decided. In this case the question of the exemption from ad valorem taxation of the 5 surrounding acres was presented, and this court rightly held, in my judgment, that the Legislature had no right to exempt from ad valorem taxation any part of an oil lease because of the payment of the oil production license tax. But this court in its short opinion did not discuss the validity of the oil production tax per se and rather curiously withdrew as inapt that part of the Raydure case which, in my judgment, not only was apt but was exactly what the court was called upon to determine. The part of the Raydure case withdrawn in the Association Producers case marked off the limits, in negative fashion, of the court's decision. I cannot regard the Associated Producers case as an authority for the validity of the oil production license tax.

As soon as this case was decided, consternation reigned in the camps of the oil people for unless the oil production license tax be invalid, they were subject to the double tax which the 1917 Legislature had expressly declined to impose on them because of the unwarranted burden. Whereupon this suit was promptly brought to test that question.

[fol. 94] I believe the results reached in the Raydure and the Associated Producers case to be right, but by them it is only decided that the Legislature had no authority to substitute an oil production license tax for an ad valorem tax. Whatever its authority nevertheless this is exactly what the Legislature tried to do and did do. It is shown that when the 1917 Act was up for consideration, the Legislature actually abandoned the idea of levying both a license and an ad valorem tax as it had started out to do because of the unwarranted burden which would result for the oil industry. We now by judicial decision arrive at just this result which the Legislature wished to avoid. I believe it to be demonstrated that the Legislature did not mean to place this double burden on the oil industry, and that its imposition of the license tax is so interwoven with the exemption from ad valorem taxation that the one would not have been imposed but for the exemption from the other. As we have held that it was unconstitutional to so exempt, the license tax must then fall, because it cannot be separated from the exemption without doing violence to the legislative intent. Deferring to the ability and learning of those with whom I disagree I have felt it necessary to express at this length my reasons for dissenting from the majority opinion by this court on the cross appeal.

[fols. 95 & 96] On the original appeal I concur in its affirmance

on the authority of Barriger v. Louisville Gas & Electric Co., 196 Ky. 258; 244 S. W. 690.

E. L. McDonald, Lexington, Ky., O'Rear, Fowler & Wallace, Frankfort, Ky., for Appellant.
Frank E. Daugherty, Atty. Gen., Frankfort, Ky., Chas. Creal, Asst. Atty. Gen., Frankfort, Ky., for Appellee.
Robt. H. Winn, Mt. Sterling, Ky., J. P. Harrison, Monticello, Ky., amici curiae.

[fol. 97] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed June 3, 1925

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States and the Associate Justices of said Court:

Now comes the Swiss Oil Corporation, plaintiff in the above cause, and would show unto this Honorable Court that in the record and proceedings and rendition of the decree in the above cause by the Court of Appeals of the State of Kentucky, it being the Highest Court of said State in which a decision could be had in said cause, a manifest error has occurred, greatly to its damage, whereby petitioner feels aggrieved.

1. The appellant's bill alleges and shows that it was at all times mentioned therein, a producer and transporter of crude petroleum oil [fol. 98] in the State of Kentucky. That its entire business as a transporter of oil is in interstate commerce. It listed and paid taxes on all of its properties of every kind and character in the State of Kentucky for the taxing year 1924 and for all the years prior thereto in which it was engaged in business in said State. The State Tax Commission, acting as a Board of Assessment and Valuation under Section 4223c-1 Kentucky Statutes, being article 9 of chapter 1, Acts of 1917 as amended by chapter 122 Acts of 1918, assessed a tax against it of one per cent on the value of all the oils transported by it in pipe lines for the years 1922, 1923, and 1924, which tax was imposed in addition to the ad valorem tax which appellant was required to pay for said years. Appellant was thus required to pay and did pay double taxes on all property in the State of Kentucky for the years in question; and was, by said statute, required to pay and did pay taxes on the privilege of transporting oil in interstate commerce in violation of the Federal Constitution. It says that Section 4223c-1 Kentucky Statutes provides for the assessment and levy of the tax in question without giving the tax payer a hearing or without allowing an appeal to the aggrieved taxpayer from the assessment made by the State Board of Assessment and Valuation. Said taxes were assessed and recovered into the State Treasury under

an order of law and appellant filed its petition under Section 162 Kentucky Statutes to compel the appellee, William H. Shanks, Auditor, to draw a warrant in its favor on the Treasurer of the State of Kentucky for the sum of $8,944.64, this being the amount which appellant had paid within two years next before the filing of its petition under said invalid and void statute. The Franklin Circuit Court upon a hearing of its complaint held that said statute was invalid and that the appellant was entitled to the relief sought in the [fol. 99] bill and directed the Auditor of Public Accounts to draw a warrant in appellant's favor for the full amount sued for in said bill. Upon an appeal to the Court of Appeals of Kentucky, it being the Highest Court in said State having jurisdiction of said case, and having before it the entire record and proceedings, including briefs of counsel for both parties, after due consideration reversed the decision of the Franklin Circuit Court and sustained the validity of said State statute. It says that the question of the repugnancy of said State law to the Constitution of the United States on the points of conflict above enumerated was so presented in its bill, and the character of the issue made by the pleadings was such, that the State Court could not have decided the questions involved without deciding the Federal questions thereby presented; and that the State Court did take cognizance of said Federal questions, and decided same in favor of the validity of the State statute greatly to the prejudice of plaintiff in error.

2. That in the record and proceedings it will appear that there was drawn in question the validity of a statute of the State of Kentucky and an authority exercised under said statute on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the validity of said statute, all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herein.

Wherefore petitioner prays that its appeal be allowed and that a transcript of the record, proceedings and papers upon which errors were made, duly authenticated, be ordered sent to the Supreme Court [fols. 100 & 101] of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

Swiss Oil Corporation, by E. L. McDonald, O'Rear, Fowler & Wallace, Solicitors.

[File endorsement omitted.]

[fol. 102] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 3, 1925

Now comes the appellant, Swiss Oil Corporation, and says that the decree entered in the above cause on March 20th, 1925, is erroneous and unjust to the appellant, and feeling himself aggrieved thereby it has filed a petition for a writ of error to the Supreme Court of the United States for the purpose of having the record and proceedings in this cause examined and corrected; and it now comes and files the following assignment of errors upon which it will rely on its said appeal:

1. The appellant having been subjected to the exaction of a tax of one per cent of the value of crude oil produced by it in Kentucky, in addition to the payment by it of ad valorem taxes upon all of its [fol. 103] property, drew in question the validity of the law, being Chapter 122 of the Acts of the General Assembly of Kentucky of 1918, under which such tax on production was imposed, seeking by mandamus to compel the State Auditor to refund the amount of such tax so exacted and paid within two years prior to the time of such application amounting to eight thousand nine hundred and forty-four dollars and sixty-four cents ($8,944.64) pursuant to the provisions of Section 162, Kentucky Statutes; assailing the validity of such law upon the ground, among others, that it imposed a double tax upon the property of appellant, and other producers of oil in like situation, thereby discriminating against them and denying them the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; said Court of Appeals of Kentucky by its judgment erroneously sustained the validity of said Statute, and denied all relief to appellant.

2. Appellant further called in question the validity of said Statute, being Chapter 122 of the Acts of 1918, now Section 4223c-1 Kentucky Statutes, upon the further ground that Section 3 of said Act providing that the tax thereby provided should be imposed and attach when the oil is first transported from the place of production, and such transportation being effected by common carriers, and constituting interstate commerce said Statute by the imposition of such tax unduly hampered and interfered with such commerce between States, contrary to the provisions of the commerce clause of the constitution of the United States, being Article 1, Section 8; [fols. 104 & 105] and said Court of Appeals by its judgment sustained the validity of said Statute.

3. Appellant further called in question the validity of said Statute, Chapter 122 of Acts of 1918 upon the further ground that same provides for the assessment, levy and collection of said tax without affording to the taxpayer an opportunity to be heard at any

stage of the proceedings, thereby constituting a taking of appellants property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and said Court of Appeals of Kentucky erred in its judgment in sustaining the validity of said Statute notwithstanding its unconstitutionality in the respect mentioned.

Wherefore it prays that said decree be reversed and the Court of Appeals of Kentucky be directed to enter a decree holding the said State Statute to be in conflict with the Constitution of the United States and void, thereby affirming the decision of the lower Court in said cause.

E. L. McDonald, O'Rear, Fowler & Wallace, Solicitors for Appellant.

The foregoing assignment of errors were attached to and made a part of the petition for a writ of error on the above case, which writ of error was this day granted. This 3rd day of June, 1925.

Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky.

[File endorsement omitted.]

[fol. 106] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

WRIT OF ERROR—Filed June 3, 1925

The President of the United States to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea or cause which is in said Court before you, or some of you, in a case between the Swiss Oil Corporation, appellant, and William H. Shanks, Auditor of Public Accounts, appellee, your Court being the highest Court of said State having jurisdiction to render judgment in the case, there was drawn in question the validity of a statute and the authority exercised thereunder on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the validity of the statute of said State, and there being manifest error in said decision greatly to the damage of the Swiss Oil Corporation, the petitioner in [fols. 107 & 108] error, and we being willing that if there is error it should be duly corrected, we do, therefore, command you, if judgment be therein given, that under the seal of your Court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ so that you may have the same at Washington on the 3rd day of July A. D. 1925, in the Supreme Court to be then and there held, that the record may be inspected by said Court and justice done.

Witness the Honorable William Howard Taft, Chief Justice of

the Supreme Court of the United States, the 4th day of June A. D. 1925.

J. W. Menzies, Clerk United States District Court, Eastern District of Kentucky, by Lillian M. Wiard, D. C. (Seal of U. S. District Court, East. Dist. Ky., U. S. of America.)

Allowed by Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky.

[File endorsement omitted.]

[fols. 109 & 110] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

On this the — day of May A. D. 1925, came on to be heard the application of the plaintiff, Swiss Oil Corporation, by its counsel for a Writ of Error, and it appearing to the Court from the petition filed herein, and the record filed therewith, that the application ought to be granted and that a transcript of the record, proceedings and papers upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is, therefore, ordered that the Writ of Error allowed upon the plaintiff giving bond conditioned as the law directs in the sum of Five Hundred Dollars, and that a true copy of the record, assignment of errors and all proceedings, had in the case in the Court of Appeals of Kentucky, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said Court may inspect and correct same as according to law and justice should be done.

Warner E. Settle, Chief Justice of the Court of Appeals of the State of Kentucky.

[fols. 111-113] BOND ON WRIT OF ERROR FOR $500.00—Approved and filed June 3, 1925; omitted in printing

[fols. 114 & 115] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed June 3, 1925

To the Clerk of the Court of Appeals of Kentucky:

It is stipulated and agreed that you shall prepare and complete a transcript of the record in this case including all pleadings, exhibits

and orders of the trial Court and the Court of Appeals of Kentucky, including the written opinion and dissenting opinion of the trial Court and the judgment and decree of the Court of Appeals of Kentucky and its mandate, and the assignment of errors, to be filed in the office of the Clerk of the Supreme Court of the United States to be used on the appeal heretofore allowed.

O'Rear, Fowler & Wallace, Counsel for Plaintiff in Error.
Frank E. Daugherty, Atty. Genl., Counsel for Defendant in error.

[File endorsement omitted.]

[fol. 116] CITATION—In usual form, showing service on Frank E. Daugherty; filed June 3, 1925; omitted in printing

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[fol. 117] IN COURT OF APPEALS OF KENTUCKY

RETURN TO WRIT OF ERROR

COMMONWEALTH OF KENTUCKY,
The Court of Appeals, ss:

In obedience to the commands of the attached Writ of Error I hereby transmit to the Supreme Court of the United States a complete transcript of the record with all things touching the same as appears from the records and files of my office, in the case of Swiss Oil Corporation, Appellant, and Plaintiff in Error, against W. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky, Appellee and Defendant in Error.

In Testimony Whereof, I have hereunto set my hand and affix- the seal of my office.

Done at the Capitol at Frankfort, Kentucky, on this the 11th day of June, A. D. 1925.

Jno. A. Goodman, Clerk Court of Appeals of Kentucky.
(Seal of Court of Appeals, Kentucky.)

Fee for transcript, $38.00.

Endorsed on cover: File No. 31,279. Kentucky Court of Appeals. Term No. 556. Swiss Oil Corporation, plaintiff in error, vs. William H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky. Filed June 20th, 1925. File No. 31,279.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 148

SWISS OIL CORPORATION, - - - Plaintiff-in-Error,

vs.

WILLIAM H. SHANKS, Auditor of Public Accounts for the Commonwealth of Kentucky, - Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

EDWARD L. McDONALD,
EDWARD C. O'REAR,
WILLIAM T. FOWLER,
WILLIAM L. WALLACE,
Attorneys for Plaintiff-in-Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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ARGUMENT.

(a)

PAGE

PAGE

LIST OF AUTHORITIES.

31279.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 556.

SWISS OIL CORPORATION, - - *Plaintiff-in-Error,*

vs.

WILLIAM H. SHANKS, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF KENTUCKY, - - - *Defendant-in-Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF-IN-ERROR.

---

b.

The opinions delivered in the Court of Appeals of Kentucky are officially reported sub. nom. Swiss Oil Corporation v. Shanks, Auditor, in 208 Ky. 64; and may also be found at 270 S. W. 478; and also on pages 28, *et seq.*, of the printed record herein.

c.

STATEMENT OF GROUNDS OF JURISDICTION.

1.

The judgment sought to be reversed was rendered by the Court of Appeals of Kentucky, March 20, 1925 (Record, 27).

2.

(a) The claim was advanced by plaintiff-in-error in its petition that the Oil Production Tax Law under which it was required to pay to the State a tax of 1% on oil produced was void because it was a property tax imposed in addition to the general ad valorem tax already imposed upon the same property required by the Constitution of Kentucky, other classes of property not being subject to such double taxation, contravening the amendment to the Constitution of the United States, Article XIV, Section 1, denying it the equal protection of the laws, as well as contravening the provisions of the Constitution of Kentucky, Sections 171 and 172 (Record, 1, 4, 6).

The Court of Appeals, however, sustained the validity of the law, ruling that the tax was not a property but a license tax and did not constitute such double taxation (Record, 32).

(b) The further claim was advanced by plaintiff-in-error in its petition that the law was void because it imposed the tax when the oil was transported from the place of production, such transportation being an in-

terstate shipment by a common carrier, and was an interference with interstate commerce in violation of the Constitution of the United States, Article I, Sections 8 and 10 (Record, 6).

The Court of Appeals held that this claim was not sound, but further ruled that even if it were, it could not affect the decision of the case because the Act of 1918, under which the tax was imposed, was an amendment of a prior Act of 1917, which was not subject to such objection, and under which the same amount of tax would be due if the amendment were void (Record, 32). The Court, by its judgment, upheld the imposition of the tax under the 1918 Act, there being no effort to comply with the provisions of the earlier Act.

(c) The further claim was advanced by plaintiff-in-error in its petition that the tax imposed upon it and sought to be recovered was assessed and collected under the provisions of the Act assailed which afforded no notice to the owner of the oil assessed, no provision being made and no opportunity being given to either appear and be heard as to the value thereof or to appeal from such assessment, such proceedings therefore depriving it of its property without due process of law, contrary to the XIV Amendment to the Constitution of the United States, Section 1 (Record, 5, 6).

The Court of Appeals, however, upheld the imposition of the tax, holding that even if the Act of 1918 did not afford such opportunity to be heard, and was void for that reason, it would leave the Act of 1917 in effect,

under which the same amount of tax would be imposed (Record, 32).

The effect of its judgment is to uphold the validity of the Act of 1918 under which the tax was actually imposed, there having never been any effort to comply with the Act of 1917 or to afford the taxpayer the opportunity to be heard.

3.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by Act approved February 13, 1925, there being drawn in question on the ground of their being repugnant to the Constitution of the United States the law or laws of the State of Kentucky under which the tax on the production of crude oil was imposed upon the plaintiff-in-error, and the decision of the Court of Appeals of Kentucky, being the highest Court in said State, was in favor of the validity of such law.

4.

Cases believed to sustain such jurisdiction are:

Dewey v. Des Moines, 173 U. S. 193.
Kansas City Sou. Ry. Co. v. Road Imp. Dist., 266 U. S. 379.
Ward v. Love Co., 253 U. S. 17.

d.

STATEMENT OF CASE.

By its petition filed in the Circuit Court of Franklin County, Kentucky, the Swiss Oil Corporation sought a mandamus against the defendant, W. H. Shanks, Auditor of the State of Kentucky, requiring him to issue his warrant for the refund of Eight Thousand Nine Hundred Forty-four Dollars and Sixty-four Cents ($8,944.64) which had been exacted by and paid to the State of Kentucky as the tax at the rate of 1% of the value of crude oil produced by said corporation in Kentucky within two years theretofore, under the provisions of an Act of the General Assembly of Kentucky, approved March 29, 1918, which Act was alleged to be void.

This is the appropriate method of securing the refunding of sums paid as taxes, when no such taxes were in fact due, under the provisions of Section 162 of Kentucky Statutes, and has been approved by the Court of Appeals of Kentucky as a proper method of testing the validity of laws under which such taxes were exacted.

Craig, Auditor, v. Security Prod. & Ref. Co., 189 Ky. 565.
Craig, Auditor, v. Frankfort Dist. Co., 189 Ky. 616.
Craig, Auditor, v. Taylor, 192 Ky. 36, 58.
Craig, Auditor, v. Renaker, 201 Ky. 576.

The history of the legislation and of the administration of the Oil Production Tax Law are set out in the petition and admitted on this record.

It is shown that the taxes were paid by pipe line companies on behalf of the plaintiff upon assessments made by the State Tax Commission, under the provisions of the said Act of 1918, a copy of which Act is filed with the petition. (See Record, 11, where it is printed in full.)

According to its title, said Act purports to amend and re-enact Chapter 9 of the Acts of the Extraordinary Session of the General Assembly of 1917, but in the body of the Act there is no further express reference to the Act of 1917.

A copy of said Act of 1917 is also filed with the petition (Record, 9).

The first section of the Act of 1917, as passed by the House of Representatives, was in part as follows:

> "Every person, firm, corporation or association engaged in the business of producing oil in this State, by taking same from the earth, shall in addition to the other taxes imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to 1 per centum of the market value of all oil produced in this State * * * etc."

As amended in the Senate and finally passed, the above section read as follows:

> "Every person, firm, corporation or association engaged in the business of producing oil in this state, by taking same from the earth, shall, in lieu of all other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State, equal to 1 per centum of the market value

of all oil produced in this State * * * etc." (Record, 2).

The circumstances under which such amendment was made, and the manner of the subsequent administration of the law are thus stated in the petition and stand admitted (Record, 2, 3):

"The Amendment and passage of said Act in said form followed a conference between certain persons engaged or interested in the production of crude oil and officials of the State desirous of effecting legislation which would produce to the State greater revenue from oil producing properties than that theretofore derived. It was recognized by all such persons that the laws for the ad valorem assessment of such property as theretofore administered did not operate fairly nor produce an adequate revenue to the State, and said producers agreed to the enactment of a law by which the oil produced should be taxed, as indicated in said Act, and it was fairly agreed (fol. 7) and understood that the method of taxation so provided was a complete system for the taxation of such property and was to be in lieu of all other taxes thereon.

"Pursuant to such agreement and understanding the law was so construed and administered by the officers of the State, the State Tax Commission advising and directing the producers of such oil who paid the tax thereby imposed, not to list for ad valorem taxation the wells and property from which such oil was produced.

"At the following session of the General Assembly of 1918, the above mentioned Act was enacted, further and more definitely indicating the intention of the Legislature to provide a production tax as the exclusive and complete method of taxing such property, and materially altering the method and means for collecting said tax."

It will be noted that both in the title and body of the Act of 1917 in its original form, as introduced, the intention was to impose a license tax for the privilege of engaging in the business of producing oil, which should be in addition to the ad valorem taxes on the property of the producer.

It is equally clear that by the Act as amended, and passed, it was intended that no other tax should be assessed against the property from which the oil so taxed should be produced, it being designed to substitute this production tax for the annual ad valorem tax required by Section 171 of the State Constitution.

This Act required producers to make reports every three months, from which, and from other information, the State Tax Commission was to determine the value upon which the tax was to be paid, notifying the producers and affording them an opportunity to be heard.

The Act of 1918 in its title refers to the Act of 1917 as imposing a license, but neither in the title nor body of the Act does said Act of 1918 purport to impose a license tax.

Its first section is in part as follows (Record, 11):

> "Every person, firm, corporation or association producing crude oil in this State, shall, in lieu of all other taxes on the wells producing said crude petroleum, annually pay a tax equal to 1 per centum of the market value of all crude petroleum so produced," etc.

The administrative features of the law are also materially changed. Instead of requiring producers to report every three months, and to pay after assessments

of their production shall have been made, all transporters of such crude oil are required to make monthly reports of the aggregate amount and value of the oil transported from the places of production. The transporter is notified of the assessment and required to pay the tax.

The Act contains no reference to the privilege or business of producing crude oil, as did the previous Act, does not require the producer to either register, make any reports, pay the tax, or do anything whatever; requires no information as to who are the owners of such oil and affords them no notice whatever at any stage of the proceedings for the imposition of the tax.

Notwithstanding the agreement under which the law was passed, and its contemporaneous construction by the State authorities, the Court of Appeals of Kentucky in the case of Raydure v. Board of Supervisors, 183 Ky. 84, held that the Legislature had no power under the State Constitution to substitute the production tax for the ad valorem method of taxing such property, nor to exempt it from ad valorem taxation according to its fair cash value as provided by Sections 171 and 172 of said Constitution.

Consequently, the plaintiff has been subjected, not only to the production tax, according to the Act of 1918, but in addition its wells and all property from which the crude oil is produced have been regularly assessed at their full value, and it has been required to pay State, county, and local taxes thereon (Record, 3).

The validity of the Act and of the imposition of the tax were assailed on many grounds, some of which did not involve Federal questions, and will not be considered herein. Among such grounds, now to be considered, it was charged that the Act was void and the imposition of the tax illegal, for the following reasons, as hereinabove indicated:

a. Because as construed and administered by the State authorities, the law imposed double taxation upon the property of plaintiff at the same time, which was not imposed upon other classes of property, thereby denying it the equal protection of the law in violation of the 14th Amendment to the Constitution (Record, 4, 6).

b. Because it interferes with interstate commerce in violation of Article I, Sections 8 and 10, of the Constitution, it being provided by Section 3 of the Act, as follows:

> "The tax hereby provided for shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production."

It is alleged that the oil of the plaintiff is transported from the place of production by pipe lines engaged in interstate commerce and that when the oil is taken from its tanks, "there is commenced a continuous and uninterrupted journey, or transportation of such oil to other states" (Record, 6).

c. Because no provision is made in proceedings for assessment of such tax for notice to the owner of the

oil, and no opportunity given to appear or be heard as to such assessment, in violation of the due process of law required by the 14th Amendment to the Constitution (Record, 5, 6).

Such proceedings were had in said Circuit Court that judgment was rendered, after overruling a general demurrer to the petition, and after the defendant, Auditor, had declined to further plead, by which the Court held that the said Act under which the production tax was imposed was invalid, and the taxes illegally exacted thereunder; and said W. H. Shanks, Auditor, was directed to draw his warrant on the State Treasurer in favor of the plaintiff for the sum of Eight Thousand Nine Hundred Forty-four Dollars and Sixty-four Cents ($8,944.64) so illegally exacted from it (Record, 21).

The Court, however, denied the prayer of the plaintiff to be permitted to sue for other taxpayers in like situation.

In the memorandum opinion filed in the Circuit Court, the learned judge held the law void because it was plainly intended that the production tax was a property tax, and was to be in lieu of other taxes, which was in violation of Section 171 of the State Constitution (Record, 21).

Upon appeals taken by both parties, the Court of Appeals of Kentucky, in its opinion (Record, 28) held that the law was valid, the tax imposed being a license tax, the question being settled by previous decisions in Raydure v. Board of Supervisors, 183 Ky. 84, and Associated Producers Co. v. Supervisors, 202 Ky. 538.

With reference to the Federal questions raised by the plaintiff, the Court said (Record, 32):

> "We might, as in the Raydure case, dispose of each of these contentions upon its merits, and then show that, even if meritorious, that fact could not affect the decision of this case. We shall, however, for the sake of brevity, confine our discussion to an effort to show that the latter of these propositions is true."

It is then said that if any or all of such contentions are sound as to the Act of 1918, they do not apply to the Act of 1917, which would be left in effect and under which the same tax would have been collected. The Court takes no notice of the fact that no effort was made in the assessment and collection of the tax to comply with the provisions of the Act of 1917, and ignores the contention that the Act of 1917 is equally obnoxious as the Act of 1918 to the 14th Amendment, in imposing double taxation, and denying the equal protection of the laws.

A dissenting opinion was delivered by Judge Dietzman (Record, 33), in which, after an illuminating review of the history and administration of the Act, it is said (Record, 38):

> "I believe the results reached in the Raydure and the Associated Producers case to be right, but by them it is only decided that the Legislature had no authority to substitute an oil production license tax for an ad valorem tax. Whatever its authority, nevertheless this is exactly what the Legislature tried to do and did do. It is shown that when the 1917 Act was up for consideration, the Legislature actually abandoned the idea of levying both a li-

cense and an ad valorem tax as it had started out to do because of the unwarranted burden which would result for the oil industry. We now by judicial decision arrive at just this result which the Legislature wished to avoid. I believe it to be demonstrated that the Legislature did not mean to place this double burden on the oil industry, and that its imposition of the license tax is so interwoven with the exemption from ad valorem taxation that the one would not have been imposed but for the exemption from the other. As we have held that it was unconstitutional to so exempt, the license tax must then fall, because it cannot be separated from the exemption without doing violence to the legislative intent."

e.

It is intended to urge each of the assigned errors in the above judgment of the Court of Appeals of Kentucky which may be briefly specified as follows:

(a) The production tax, whether administered under the Act of 1918 or that of 1917, as construed and administered is a property tax, to enforce which, in addition to the general ad valorem tax required by the State Constitution, Section 172, is to impose double taxation, which is not imposed upon other classes of property, is forbidden by the State Constitution, Section 171, and is in violation of the 14th Amendment, as denying the equal protection of the laws.

(b) The Act of 1918, under which the taxes involved in this case were actually imposed is violative of the Commerce Clauses (Const., Art. I, Secs. 8 and 10), because it imposes the tax only when the oil is trans-

ported, which, under the facts shown is an undue interference with interstate commerce.

(c) Said Act is also violative of the 14th Amendment because it does not afford due process of law to the taxpayer, containing no provision for notice to him and affording no opportunity to be heard.

These will be considered in their order.

f.

ARGUMENT.

(a)

The Production Tax Imposed by the Act is a Property Tax, and Void.

Description or Classification of Tax by State Court Not Controlling.

In the consideration of the questions raised as to the invalidity of the tax imposed by reason of violation of the Federal Constitution, this Court will determine for itself the nature and effect of the Act as administered and will not be controlled by either the name or description of it given by the State Legislature or Courts, nor the construction placed upon it by such Courts.

In Pollock v. Farmers Loan & Trust Co., 157 U. S. 580, it is said:

> "The name of the tax is unimportant."

This Court also said in Choctaw Oil & Gas Co. v. Harrison, 235 U. S. 292:

> "Neither State Courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."

So in St. Louis L. & S. W. R. Co. v. Arkansas, 235 U. S. 350, 362, it is said:

> "Upon the mere question of construction we are, of course, concluded by the decision of the State Court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court.
>
> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

In holding an alleged "license tax" on whiskey, imposed by Kentucky, to be void, this Court also said in Dawson v. Ky. Distilleries & Warehouse Co., 255 U. S. 288:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously, it has none of the ordinary incidents of an occupation tax."

In holding an oil production tax imposed by the State of Oklahoma to be a property tax and not a license tax, the Supreme Court of Oklahoma said in *In re:* Skelton's L. & Z. Co.'s Gross Production Tax, 197 Pac. 495, 498:

> "The kind of tax or species to which it belongs is not made by giving it a name, nor its species changed by changing its name, either by legislative enactment or by judicial decree. It is a property tax or an occupation tax, according to the mission given it by the law under which it is levied."

In Standard Oil Co. v. Graves, 249 U. S. 389, 394, this Court, holding to be void a law imposing fees for oil inspection, as interfering with interstate commerce, said:

> "The Supreme Court of the State held that the tax was not upon property, but could be sustained as an excise or occupation tax upon the business of selling oil within the State. The reason given by the Court for holding that the tax could not be upheld as a property tax rested upon provisions of the State Constitution.
>
> "While this Court follows the decisions of the highest Court of a State as to the meaning of Statutes in cases of this character, the name given to the Statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void.
>
> "Winn v. Barber, 136 U. S. 313, 319; Crew Levick Co. v. Penn., 245 U. S. 292, 294."

See also LaCosta v. Dept. of Conservation, 263 U. S. 545, 550, and cases cited.

The Court of Appeals of Kentucky, recognizing and adhering to the law as stated in its previous decisions—Raydure v. Board of Supervisors, 183 Ky. 84, and cases cited, including Levi v. City of Louisville, 97 Ky. 394, that a license or production tax could not be substituted for the ad valorem tax required to be assessed on all property by Sections 171 and 172 of the State Constitu-

tion, sought to avoid the appearance of double taxation of oil producing property in violation of such clauses of the State Constitution, which require uniformity, as well as the Fourteenth Amendment to the Federal Constitution, by characterizing the production tax as a license, and not property tax, and by construing the words in the 1917 Act:

> "In lieu of all other taxes on the wells producing said oil imposed by law."

and the words in the 1918 Act:

> "In lieu of all other taxes on the wells producing said crude petroleum."

as if they meant—

"in lieu of all other license taxes" (Record, 31).

It is submitted that this construction is not binding on this Court, and that it will determine for itself whether the production tax so imposed is a license or a property tax, and if a property tax, whether it violates the Federal Constitution.

State Constitutional Provisions.

The provisions of the State Constitution relative to taxation, material to be here considered are as follows:

Section 171 provides in part:

> "* * * taxes shall be levied and collected for public purposes only. They shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax * * *"

Section 172 requires that all property shall be—

> "assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Construing these provisions it is said in Levi v. City of Louisville, 97 Ky. 394, 408:

> "The framers of the constitution left no discretion with the legislature as to the assessment and valuation of either real or personal property, or as to what property shall be taxed or exempted from taxation, and however wise or unwise the system may be, it is the mandate of the constitution that all must obey. It results, therefore, that the imposition of a license tax upon personalty whether used or not in a business for the exercise of which license fees are paid, or a license tax imposed, is not warranted by the constitution."

It is conceded by the State authorities that the oil production tax cannot be sustained if it is a property tax, under the above provisions, but it is contended that it is authorized by Section 181 of the State Constitution which is in part as follows:

> "The General Assembly may, by general laws only, provide for the payment of license fees or franchises, stock used for breeding purposes, the various trades, occupation and professions, or a special or excise tax; and may by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

Section 174 provides that all property not exempted by the Constitution shall be taxed in proportion to its value, corporate property paying the same rate as individual property, and adds:

> "Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

Construing these provisions, the Court said in Levi v. City of Louisville, 97 Ky. 394, 406:

> "The words 'license tax' imply a burden on that which is not property, but results from its enjoyment, or the conduct of the business or calling, and the legislature assembling after the adoption of the constitution, and composed of some of the leading members of the constitutional convention, understood the meaning attached to the phrase license tax, and under the title of revenue and taxation, in subdivision 4 of chap. 109, imposed a license tax on certain kinds of business, such as a license on taverns, on retailing spirituous liquors, on saloons, on selling pistols and bowie knives, on ten pin alleys, peddlers, insurance companies, circuses, and so on, showing plainly that its imposition as a tax upon property was not even considered. Its meaning is therefore clearly ascertained by its application, as understood by the legislature, and made still more so by the debates in the convention by every member who spoke upon the subject, and still plainer by the provisions of the constitution we are now considering.
>
> "The convention doubtless saw, after it had adopted a general system for assessing and taxing property, that the legislature should be clothed with a power that might be required to be exercised in imposing bur-

dens for the exercise of these privileges under the police power of the State, and that such intangible rights as that of franchises and incomes, should be made the subjects of taxation, and therefore provided in sec. 174 that nothing shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises, and while this character of tax might be upheld even without express constitutional authority, it was doubtless thought best to be more specific on the subject. The members of the convention had no thought, when annexing to sec. 174 the power to the legislature to impose a license tax, that they were destroying the structure they had already constructed, in regard to the taxation of property, and that constituted the governing feature of taxation in that instrument, and by so doing had delegated the same power to the legislature and municipalities to classify property for taxation as under the former constitution."

Nature of Tax Imposed by Act of 1918.

Since the taxes involved in this case were exacted and paid under the provisions of the Act of 1918, and could not possibly be said to have been assessed or paid under the Act of 1917, no attempt having been made to comply with the provisions of the earlier Act, we will first consider the nature and effect of said 1918 Act.

Although the title of the Act recites that it is to "amend and re-enact" the Act of 1917, "which Act imposes a license," etc., there is no express reference in the body of the Act to the Act of 1917, but it is clear that it was intended to adopt a new and entirely different method of imposing a tax on the production of

crude oil, in lieu of any other taxes on the property from which it is produced, and that there was no thought of imposing a license tax on any occupation, such as was authorized by the State Constitution.

The word "license" is not used in the body of the Act, nor is there a description of any occupation, on which the tax could be said to be imposed.

It is true that the tax is said to be imposed on the "person, etc., producing crude petroleum oil," but the transporter is the one who is made liable for reporting and for payment of the tax and is required to collect it "from the producer in either money or crude petroleum."

The tax is only imposed when the oil is first transported from the place of production so that if it is there consumed or is never transported the tax never attaches.

There is nothing in the body of the Act from which it can be determined upon what, if any, occupation the tax is imposed.

The transporter is the one required to register, to make reports, to pay the tax and to collect it from the producer. In fact he is the only one who is required to do anything whatever in connection with the tax; and the tax does not "attach" upon the production, storage or utilization of the oil, nor does it attach at all until the transporter moves it.

The tax is laid upon all the oil produced, whether it belongs to the one engaged in the occupation of producing it, or not. If the producer is an independent contractor owning no part of the oil, he is not subject

to any tax. In probably no case will it occur that the producer owns all the oil produced by him. The farmer who has in his lease reserved a royalty of 1/8 of the oil to be delivered into pipe line for him is certainly not engaged in the occupation of producing the oil and yet his oil is subjected to the tax.

If it be suggested, as in the opinion in the Raydure case (183 Ky. 84, 98) that the intention to impose a license tax is indicated by the title of the Acts of 1917 and 1918, we answer that the title of the Act of 1917 may have correctly indicated its nature prior to its amendment, but it certainly cannot be claimed that the repetition of the title of the Act of 1917 in the title of the Act of 1918, indicated any intention to impose a license tax by the latter Act.

The title of the Act of 1918 does not say that it imposes a license tax, but that it amends and re-enacts the Act of 1917, "which Act imposes a license, etc."

But even if the title clearly stated that by this Act it was intended to impose a license tax on the occupation of the producer, it could not supply the lack of provisions to that effect in the body of the Act.

In 25 Cyc. 605, it is said:

> "Whenever an Act imposing a license tax on a given class of persons gives no definition of that class, but in describing it uses words having no fixed or reasonably certain meaning, such Act is void."

Here there is no effort whatever to describe any occupation upon which a license is imposed.

If it be contended, however, that the Act is sustainable as a license tax, imposed upon all persons owning oil that may be produced and that may be removed from the place of production, we answer that this is not the nature nor function of a license tax as contemplated and authorized by the Constitution.

It can be readily seen that if it is permissible to tax under the guise of license, the profit to be derived from or the use or enjoyment of property, this is in effect a tax on the property itself, and if the property is already taxed under general laws, results in double taxation.

A similar attempt to tax under the guise of license, whiskey, upon its removal from storage, was made by the Legislature of Kentucky, by Act of 1920, Ch. 13. The Act both in its title and body clearly and explicitly indicated the intention to impose a "license tax" on persons "engaged in the business of manufacturing * * * whiskey * * * and engaged in the business of owning and storing such spirits in bonded warehouses in this State and in removing same therefrom * * *."

It was also provided that the "license tax" thereby imposed was "in lieu of all other license, franchise or excise taxes." There was no doubt of the intention to impose the tax as a license tax in addition to the ad valorem tax and there was involved a tax of more than $16,000,000.00.

The Kentucky Court in Craig, Auditor, v. E. H. Taylor, Jr., & Sons, 192 Ky. 36, held the Act void as a tax on the property itself in conflict with provisions as

to ad valorem taxation, and that the alleged business sought to be taxed was not such an occupation as contemplated by the Constitution, Section 181.

This Court held the same Act void in Dawson, etc., v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288. That case is analogous to the present one, and controlling in its effect.

In the opinion of the State Court, delivered by Judge Quin, page 37, it is said:

> "Of the many points ably briefed by counsel we deem it necessary to consider but one, viz.: whether the tax is an occupation or a property tax. The determination of this question disposes of the appeal. It is conceded by appellants that as an ad valorem tax it cannot be sustained, and though called an annual tax it was not intended to be such. Unless, therefore, we conclude it is an occupation or excise tax, the judgment below must be affirmed."

The Court further says on page 40:

> "Then, again the tax is not upon the business of removing liquor owned. A single transaction does not constitute engaging in business, within the contemplation of the statute, be it that of buying and selling whiskey or in the business of otherwise using it, as the tax is payable in respect to any lot of whiskey removed. Thus, we find that the tax is in reality one upon the act of removal from bonded warehouses within the State.
>
> "But, as said in J. and A. Freiberg v. Dawson, *et al.*, — Federal —, 'The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption or

sale * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.'

"The opinion in the foregoing case was that of three federal judges upon a hearing under Sec. 266 of the Judicial Code, and in which the same act of 1920, involved here, was held to be unconstitutional. This conclusion was affirmed on appeal to the Supreme Court in Dawson, *et al.*, v. The J. and A. Freiberg Co. * * *

"It is significant that of those who have had occasion to construe this statute, two district judges, one circuit judge and the members of the Supreme Court, twelve judges in all, concur in the opinion that the tax is not sustainable as an occupation or excise tax and is none other than a tax on the property itself and as such is unconstitutional."

Much less can the oil production tax law of 1918 be sustained as a license tax since there is not even a designation of it as a license tax, nor an attempt to describe an occupation affected by it, but the tax is frankly and directly imposed on the oil when it is transported from the place of production, which as in the case of the removal of whiskey from bond, is necessary if the owner is to derive any benefit from it.

In the opinion of this Court by Justice Brandeis, it is said:

"In fact the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the state. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his

> property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. Compare Thompson, Auditor, v. Kreutzer, 112 Miss. 165; Thompson, Auditor, v. McLeod, 112 Miss. 383. It cannot be made an occupation or license tax by calling it so. See Flint v. Stone Tracey Co., 220 U. S. 107, 148, 150; Zonne v. Minn. Syndicate, 220 U. S. 187; United States v. Emery, 237 U. S. 28. The language of the emergency clause in the Act discloses that the Legislature considered that it was in fact taxing the whiskey."

The emergency clause of the Act of 1918 referring to law as imposing a "tax on crude petroleum" is likewise clearly indicative of the understanding of the Legislature that they were taxing the oil.

In Thompson, Auditor, v. Kreutzer, 112 Miss. 165, 72 So. 891, the Supreme Court of Mississippi, in holding unconstitutional a license tax imposed upon the business of owning or holding more than one thousand acres of timber land, said:

> "In order that a thing may be owned, some one must, of course, have a right to the ownership thereof. A tax on a thing is a tax on all its essential attributes and a tax on an essential attribute of a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and the tax on the right

of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not a tax on property."

In Thompson v. McLeod, 112 Miss. 383, 73 So. 193, the same Court said of a license tax imposed on the business of extracting turpentine from trees:

"The act under review does not levy a privilege tax on the right or privilege of selling resin or the gum of the tree as originally extracted * * * but the privilege, if any, which is taxed, is the privilege or right of the owner or lessee of pine trees 'to extract turpentine from standing trees * * *'

"This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. * * *

"There cannot be ownership of standing pine trees without an owner, and if you tax the standing trees with an ad valorem tax, and at the same time exact tribute from the owner as a condition precedent to his right to lay hands upon the trees, the State is imposing double taxation upon the tree itself."

In Standard Oil Company v. Com., 119 Ky. 75, 80, the Court said:

"The right to own a house in which oil might be stored is not prohibited by any law. Consequently the granting of a license for that purpose gives no right. The right of acquiring property and protecting it, found in Bill of Rights, is even above the right of taxation, for the exercise of the former

cannot be denied until a license to exercise it has first been obtained from the State.

"The right to own oil depots in this State is not dependent upon a privilege to be first obtained in the form of a license granted by the State."

It is, therefore, confidently submitted that from a consideration of the language of the Act of 1918 alone, the conclusion is irresistible that it does not purport to impose a license or franchise tax upon a business or occupation as authorized by the State Constitution, but that it plainly and directly imposes a tax upon the crude oil, as property, which tax was intended to be in lieu of other taxes on the property from which the oil was obtained.

But when there is further considered, the history of the taxation of such property and contemporaneous construction of the Act, which are admitted facts in this record, there can no longer remain any doubt as to such intention.

As outlined in the petition (Record, 2, 3), the Act of 1917, as originally introduced being House Bill 49, was by clear and apt language designed to impose a license tax on persons "engaged in the business of producing oil" which tax should be "in addition to the other taxes imposed by law," and that such license tax was "for the right or privilege of engaging in such business."

Pursuant to an agreement between the State officials and oil producers, the Act was finally passed, after being amended by striking out the above words "in addition to the" inserting in lieu thereof the words "in

lieu of all" and by inserting the words, "on the wells producing said oil."

In such form in which it was passed therefore, the Act clearly imposed a license tax on the producer, "for the right or privilege of engaging in such business," which tax was measured by the amount of oil produced, and was to be "in lieu of all other taxes on the wells producing said oil imposed by law."

That the amount of such license tax could be so measured by the value of oil production was indicated by Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 604; Brown-Forman Co. v. Commonwealth, 125 Ky. 402; Brown-Forman Co. v. Kentucky, 217 U. S. 563.

By the language "other taxes on the wells producing said oil imposed by law" were evidently meant the ad valorem taxes which by then existing laws were imposed upon the property of the producers from which the oil was produced.

While the designation of the "wells producing said oil" is somewhat inapt, it could only reasonably refer to and mean the oil and gas leases and rights of the producer from which the oil was obtained, and upon which the existing laws provided for the ad valorem tax required by the State Constitution on "all property." See Wolfe Co. v. Beckett, 127 Ky. 262. No taxes other than ad valorem taxes were imposed by law at the time of this enactment, on either the wells, leases, oil in place, or otherwise, nor on any rights or privileges in connection with its production.

In the administration of this law, there was perfect agreement and accord between the State officers and oil producers, that the tax on crude oil produced was the only tax to which the producer was to be subjected with reference to the wells or property from which it was obtained, and the State Tax Commission advised and directed the producers not to list for ad valorem taxation the wells and property from which the oil was produced (Record, 3).

With this understanding, the Act of 1918 was passed, by which was provided a more effective method of obtaining the tax, by requiring the transporter instead of the producer to pay it, and by which all description of the tax as a license tax, or of its being for the right or privilege of the producer to engage in the business, was eliminated, all of which rendered the Act more conformable to the understanding and intention that the tax on the production of crude oil was to be the exclusive method of taxing such property.

It was not long, however, before the question was raised as to how much of the property of the producer was intended to be exempted from ad valorem taxes by the "in lieu" clause, exempting the "wells producing said oil" from other taxes, the producer contending that the entire lease should be exempt, although not fully drilled up, and the taxing authorities contending that only the area drained by the wells, which was fixed at five acres, was so exempted by the payment of the production tax.

The question came before the Court of Appeals of Kentucky in Raydure v. Board of Supervisors of Estill County, 183 Ky. 84, in which Raydure was appealing from a judgment directing the assessment for ad valorem taxation of his lease, after excluding from assessment five acres around each producing well.

No question was raised as to the validity of the tax on production imposed by the Act, but only the question as to the extent to which it exempted from ad valorem taxation the leases on which the wells were located. The contention was made by the appellant not only that the leases were fully drilled up so far as it was profitable to do so and that the remainder of the leases were worthless, but also that such leases were not properly subject to taxation until they are demonstrated to be valuable by development and the finding of oil thereon. The Court adhering to Wolfe County v. Beckett, 127 Ky. 252, held that such leases if they had cash value and could be sold were subject to taxation and should be listed under the general laws.

It was further contended by the appellant that the Act of 1918 exempted from further taxation the entire lease from which production was obtained which was subject to the tax thereby imposed. The Court, however, held that under Section 171 of the Kentucky Constitution a uniform ad valorem tax was required as to all property and that a tax based on production could not be substituted therefor.

Having held that the production tax imposed by the Act could not be sustained as the ad valorem tax re-

quired by the Constitution and that the leases involved in the case were subject to assessment under such general laws, it was not necessary for the Court to further construe the Act of 1918, but it did, as *obiter dictum,* express the opinion that the tax thereby imposed was sustainable as a license tax on the business of producing oil.

It also directed that upon a return of the case the value of each producing well should be excluded from assessment, but said it would express no opinion concerning "the quantity of land that should be excluded in connection with each well."

The Court was logical and consistent in holding that the Act of 1917 was void so far as it attempted to exempt any property from ad valorem taxation, but was inconsistent in directing that the wells should be excluded from assessment. As a consequence the question of what, if anything, was to be exempted from ad valorem assessment under the Act of 1918, continued to be agitated until it was only by the opinion in Associated Producers Company v. Board of Supervisors of Estill County, 202 Ky. 538, rendered March 25, 1924, that the Court definitely held that neither the wells nor any other property are so exempted from ad valorem assessment, and withdrew as inapt that portion of the opinion relating to the exemption of any acreage around a well, saying it did not even amount to a dictum.

In this last case, as well as in the Raydure case, the Court expressed an opinion as to what the Legislature meant by the Act of 1918. In both cases the opinion is expressed that it was intended to impose a license tax,

and while in the Raydure case the Court clearly understood the Act to intend an exemption at least of the well from ad valorem taxation, in the last case the Court said, "In other words, there should be no other license tax as we construe this language."

It is submitted, however, that no necessity for imputing to the Legislature the intention to pass a constitutional law can so distort the plain meaning of their language into a meaning so at variance with the agreement at the time the Act was passed, and its practical and contemporaneous construction by the State officials and all others concerned. The fact that the Legislature could not and did not accomplish what they intended, does not change the character of the tax they provided, nor convert it without their knowledge or intention from a property tax on the oil to a license tax on an occupation.

However, in the opinion of the State Court in the case at bar (Record, 28), it was held that the decisions in these cases indicating that the tax was valid as a license tax, were not *dicta,* and upon the doctrine of *stare decisis,* and in consideration among other things, of the fact that the State finances * * * had been adjusted thereto, such ruling was adhered to (Record 32).

But, even if the State Court can thus construe the law so as to avoid difficulties under the State Constitution, such construction will not influence this Court in considering the Federal questions involved.

The questions here involved have recently received careful consideration by the United States District

Court for the Eastern District of Kentucky, in the case of Eastern Gulf Oil Company v. Kentucky State Tax Commission and Frank E. Daugherty, Attorney General, in which the plaintiff sought and was granted an injunction against the defendants, restraining the enforcement of the oil production tax on the ground that the law imposing it violates both the State and Federal Constitutions.

The opinion granting the interlocutory injunction was delivered on March 31, 1926, by Circuit Judges Denison and Moorman and District Judge Cochran, and is copied in the Appendix hereto.

Both the Acts of 1917 and 1918 and all decisions of the State Court referring to them, as above indicated, were analyzed, and the conclusion was reached, notwithstanding the said decisions, that the tax imposed by the 1918 Act was essentially a property tax and not a license tax, and that it was void as a regulation, or interference with, interstate commerce.

It is submitted that the soundness of the conclusions reached in such opinion cannot be successfully questioned, and that they are controlling on this case.

Moreover, it will be noted (Record, 8) that all of the taxes paid by the Swiss Oil Corporation and sought to be recovered by it were paid prior to March 25, 1924, the date when the State Court, for the first time, in Associated Producers Co. v. Board of Supervisors, 202 Ky. 538, definitely held and announced the law, construing the Act of 1918, that the payment of the production tax did not operate to exempt from ad valorem

taxation either the "wells producing said crude petroleum" or any of the property of the producer.

Such construction of the Act and announcement of the State law, therefore, came after the rights of this plaintiff had already accrued and clearly cannot control the Federal Court in passing upon such rights.

The previous ruling of the State Court in the Raydure case directed the assessing authorities to exclude from the property assessed for ad valorem taxation "the value of each producing well thereon," thereby recognizing or establishing the rule that under the 1918 Act the payment of the production tax thereunder operated to exempt, and was "in lieu of all other taxes" on the wells or property from which the oil was produced, according to the literal interpretation of its language.

That such later decision will not be recognized as controlling the Federal Courts in adjudicating on rights theretofore attached, is held in Kuhn v. Fairmont Coal Co,, 215 U. S. 349, 360, where it is said:

> "We take it, then, that it is no longer to be questioned that the Federal Courts in determining cases before them are to be guided by the following rules:
>
> "(1) When administering state laws and determining rights accruing under these laws, the jurisdiction of the Federal Court is an independent one, not subordinate to, but co-ordinate and concurrent with the jurisdiction of the State Courts.
>
> "(2) Where before the rights of the parties accrued, certain rules relating to real estate have been so established by State decisions as to become rules of property and actions in the State, those

rules are accepted by the Federal Court as authoritative declarations of the law of the State.

"(3) But, where the law of the State has not been thus settled, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence.

"(4) So when contracts and transactions are entered into and rights have accrued under a particular State or local decision, or when there has been no decision by the State Court on the particular question involved, then the Federal Courts properly claim the right to give effect to their own judgment, as to what is the law of the State, applicable to the case, even where a different view has been expressed by the State Court after the rights of the parties accrued."

See also the following in which the same rule was applied:

Shaffer v. Marks, 241 Fed. 139.
Fetzer v. Johnson, 4 F. (2nd) 865.
Texas v. E. Texas R. Co., 283 Fed. 584.

Upon such independent consideration of the Act uninfluenced by the decision of the State Court in the Associated Producers case, and the present case, the conclusion must be reached, as it was by the three judges in the Eastern Gulf Oil case (*supra*), that the tax on production thereby imposed, was a property tax, and intended to be the only tax imposed on that kind of property (*i. e.*, the wells or property from which the oil is produced). It must also follow that since it is not allowable under the Kentucky Constitution to substitute such a tax for the annual ad valorem tax required by

Sections 171 and 172, the Act imposing such tax on production is void, and this plaintiff having paid all such ad valorem taxes on its property, is entitled to recover this illegal tax also exacted of it.

To impose both taxes upon it, against the evident intention of the Legislature, but through the action of assessing officers, and a judicial interpretation by the State Court, is to arbitrarily subject the owners of this class of property to a double burden of taxation, which is not imposed upon the owners of any other class of property, and is prohibited by the State Constitution, and is to violate its rights under the 14th Amendment by depriving it of the equal protection of the laws.

Not only is there no reasonable foundation for thus discriminating against the owners of oil producing property, but such discrimination was clearly not contemplated by the Legislature.

The fact that the discrimination is the result of judicial construction by the State Court renders it no less obnoxious to the Constitution than if it had been effected by legislation, or by executive authority.

Raymond v. Chicago Union T. Co., 207 U. S. 20, 35.

It has been frequently held that discrimination in taxation effected by systematic inequality of assessment is a violation of the provisions of the 14th Amendment.

See:

Greene v. Lou. & Int. R. Co., 244 U. S. 499.

Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122.
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350.

In Greene v. Lou. Int. R. Co., 244 U. S. 499, 502, it is said:

> "The fact should be emphasized that the Kentucky Court of last resort, far from holding that discrimination such as is here complained of, is in accord with the Constitution and laws of the State, has recognized distinctly that it is not; but has felt constrained to hold that, under circumstances similar to those of the present case, there is no redress in the Courts of the State; and that the constitutional provisions for equality and uniformity are capable of being put into execution only through the selection of proper assessing officers. Louisville R. Co. v. Com., 105 Ky. 710, 719. This, while admitting the wrong, merely denies judicial relief, and is not binding upon the Federal Courts."

And in the same case, at page 514, it is said:

> "Is discriminatory taxation, contravening the express requirements of the State Constitution, beyond redress in the Courts of the United States, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards, whose assessments are not subject to any process of equalization established by the State, and where the diverse results are the outcome, not, indeed, of any express agreement among the officials concerned, but of intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert? In our opinion, the answer must be in the negative."

It is submitted that the discrimination shown in this case by the imposition of the production tax in addition to, instead of "in lieu of" the ad valorem tax, is more burdensome and violative of constitutional rights, than was the inequality of assessment complained of in the above cases.

Tax Not Sustainable Under 1917 Act for Same Reasons.

If the Act of 1918 is thus violative of the 14th Amendment, as we contend, the 1917 Act is none the less so. It, even more clearly, purports to impose the tax on production, in lieu of all other taxes on the property from which it is produced. The history of the Amendment of the Act in the State Senate and of the contemporaneous agreement and construction of it, leave no room to misconstrue its intention.

This Act was never construed by the State Court prior to the decision of the present case, in which it does not appear to have been carefully considered, as pointed out in the opinion of the judges in the Eastern Gulf Oil Company case (*supra*), which is copied in the Appendix.

The only construction of it by the State Court, being after the rights of this plaintiff had already attached, such adjudication is not binding on this Court.

As we have seen, moreover, in considering whether the imposition of a tax violates rights under the Federal Constitution, this Court will determine for itself the nature and effect of the law as administered, independent of characterization or description of it by State Courts.

It is settled beyond controversy by the State decisions that, a license tax, or a production tax, or tax of any other description, cannot be substituted for the ad valorem tax required by Sections 171 and 172 of the State Constitution, and it is perfectly apparent, and stands admitted upon this record, the allegations of the petition not being denied, that this was just what the Legislature tried to do by this Act.

To impose both taxes under judicial construction is, therefore, clearly to deny to plaintiff, and others owning oil producing property, the equal protection of the provisions of the State Constitution requiring uniformity of taxation.

(b)

The Act of 1918, Section 3, Imposing the Tax when the Oil "is First Transported" from the "Place of Production" is Void Because it Interferes with Interstate Commerce.

In view of the provision of Section 3 of the Act of 1918, that the tax

> "shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production,"

and the facts alleged in the petition, and admitted, that when the oil is so transported "there is commenced a continuous and uninterrupted journey or transportation of such oil to other states," it can hardly be questioned that the tax so imposed is a burden upon, and interference with interstate commerce forbidden by the

Commerce Clause of the Constitution of the United States, Article 1, Sections 38 and 10.

It is thus made clear by the terms of the Act that the tax is imposed and attaches to the oil after it has become the subject of interstate commerce.

There is no doubt that the State can impose taxes upon the property so long as it remains part of the general mass of property in the State even though it may be prepared for and intended to be transported to other States, and this Court has definitely determined that the point of time when the State's power to tax property ceases, is when such property is actually committed to a common carrier for transportation or started on its final journey out of the State.

In Ayer & Lord Tie Co. v. Keown, Sheriff, 122 Ky. 580, this principle is recognized and the Court makes the following quotation from Coe v. Errol, 116 U. S. 517, as the correct statement of the law:

> "There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exported, nor are they yet in the process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of their State to the State

of their destination, or have started on an ultimate passage to that State. Until then it is reasonable to regard them as not only in the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation. The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, yet it is highly important both to the shipper and to the State that it should be clearly defined so as to avoid all ambiguity and question. Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity, as between States has commenced; but this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of their journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose of putting it in a course of exportation. It is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri,* and not at all a fixed and certain thing."

It is clear that the protection of the commerce clause attaches to the oil the moment it is drawn from

the tanks at the place of production into the lines of the transporter, who thereupon transports it to the other States, and this point of time is too late for the State to then impose any character of tax upon the oil, whether it is a property tax or a license tax.

In the Pipe Line Cases, 234 U. S. 548, it is held that the transportation of oil in pipe lines from one State to another is interstate commerce and is within the control of Congress, under the Commerce Clause.

In Eureka Pipe Line Co. v. Hallinan, 257 U. S. 265, a Statute of West Virginia sought to impose a license tax of two cents per barrel on all oil transported in pipe line, requiring the pipe line company to pay such tax. The State Court held the Act valid, as far as it was applicable to intrastate shipments, but this Court held the Act wholly void, saying in the opinion:

> "As has been repeated many times, interstate commerce is a practical conception, and as remarked by the Court of first instance, a tax to be valid 'must not in its practicable effect and operation burden interstate commerce.' It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company, not the producer, was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from the beginning, and neither the intent nor the direction of the movement changed."

The Court, at the same time, rendered an opinion in the case of the United Fuel Gas Co. v. Hallinan, 257 U. S. 277, 66 L. ed. 234, the syllabus being as follows:

> "A corporation engaged in gathering and purchasing natural gas which is distributed through its pipes, may not be subjected to a state license or occupation tax measured by the volume of the traffic, where the great body of the gas starts for points outside the state, and goes to them either in the company's own pipes, or those of connecting companies, to whom it sells, although the necessities of business require a much smaller amount of gas, destined to points inside the state, to be carried undistinguished in the same pipes and although as to the gas sold to the connecting companies and seller and purchaser may change their minds before the gas leaves the state and the precise proportions between local and outside deliveries may not have been fixed."

See also Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 297; Pennsylvania v. West Virginia, 262 U. S. 553, 596; Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 279, 255; Alpha Portland Cement Co. v. Com., 268 U. S. 203.

The case at bar is to be distinguished from Oliver Iron M. Co. v. Lord, 262 U. S. 172, where a license tax was upheld, which was based, after certain deductions, upon the value of the ore "at the place where the same is brought to the surface of the earth."

As said in the opinion:

> "The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers."

In marked contrast is the present case where the tax is imposed after the time when the producer has finished his operations in connection with it, and when the public carrier commences its transportation.

So, in Heisler v. Thomas Colliery Co., 260 U. S. 245, in which the Pennsylvania tax on anthracite coal was sustained, it appears that the tax is imposed only when the "coal is ready for shipment or market," which is clearly while it is part of the general mass of property, subject to State taxation, and before its movement in interstate commerce has commenced.

In the case of Eastern Gulf Oil Co. v. Kentucky State Tax Commission (see Appendix), the Court construing this same Act, said:

> "It remains to consider and determine whether the Act is in violation of the federal constitution. We limit ourselves to the claim that it violates the interstate commerce provision thereof. We conclude that it does. It does so, because it imposes a tax on the producer's oil after it gets and whilst it is in interstate commerce. According to the allegations of the bill, which are not questioned, the producers pump the crude petroleum directly from the wells to tank receptacles and then deliver the oil directly from those receptacles into the pipe line of the transporters, and same is transported by them immediately and directly from those receptacles without any intervening handling, storage or delay in continuous flow in interstate commerce to destination and for sale and distribution in states other than Kentucky. The tax attaches after the crude petroleum has left the possession of the producers and come into the possession of the transporters and has become an article being transported in interstate commerce. According to

Section 3, it attaches when it is 'first transported from the tanks or other receptacles located at the place of production.' That the imposition by a state of a tax on an article being transported in interstate commerce is a regulation of such commerce, and, therefore, invalid is well settled."

Taxes Sued For Not Due Under 1917 Act.

However, the Kentucky Court disposed of this question and brushed all this argument aside by saying that if the 1918 Act was invalid in this respect, the Act of 1917, which imposed the same amount of tax would be left in effect and the same tax would be due under it and there could be no recovery in this case.

Assuming that, as held by said Court, the unconstitutionality of the 1918 Act would leave the 1917 Act in effect, the fact remains that the taxes sought to be recovered were exacted under the 1918 Act, and under assessments made against the transporters of the oil, and no assessments have ever been made against the producers of oil under Act of 1917, nor against the Swiss Oil Corporation for the years in question.

Section 2 of the Act of 1917 requires the State Tax Commission to determine the value of oil produced from quarterly report required from the producer, and from other sources. Section 3 requires the Tax Commission to notify each producer of the fixing of such value, allowing him ten days to seek a change in such valuation. Section 4, provides that the taxes "shall be due and payable thirty days after notice of same has been given by the State Tax Commission." No report has ever been made to the State Tax Commission under either

law, giving it information that the Swiss Oil Corporation was a producer of crude oil or the owner of any crude oil produced, the reports made to it under the 1918 Act merely informing it of the aggregate oil transported, without information as to its producers or owners. No valuation or assessment was ever made against or in the name of this Company or of any for it of the oil produced by it; no notice was ever given it of any assessment of a tax on its production, none of these things being required by the 1918 Act under which the tax was actually collected. According, therefore, to the terms of the 1917 Act, no tax is yet due or payable under it.

It will not be sufficient to say, if the 1917 Act had been administered and the required proceedings had thereunder, that the same amount of tax on production would have have been required. The Court cannot overlook the fact that the necessary proceedings to the assessment of a valid tax were not had. The constitutional rights of the taxpayer may be violated by arbitrary and illegal exaction under the alleged authority of a statute unexceptional in form, as well as by a statute unconstitutional in its terms.

Moreover, this Court will not regard as binding, the declaration of the State Court in this case, since the rights of this plaintiff have attached, and its rights under the Federal Constitution asserted, that if the 1918 Act is invalid, the same tax will be due under the 1917 Act. This Court will, in such case, determine for itself from prior decisions of the State Court what its poli-

cy and laws were. Kuhn v. Fairmont Coal Co., 215 U. S. 349, *supra.*

It will observe that the tax imposed by the 1917 Act is in apt form and express terms, a license tax, which was intended to be imposed "in lieu of all other taxes" on the property which were or might thereafter be imposed by law. That the only other taxes so imposed by law were the annual ad valorem taxes required by the State Constitution.

According to the State law, as announced in the Raydure and other cases, such license tax could not be substituted for the ad valorem tax, in consequence of which the intention of the Legislature, having failed, the alleged license tax on production was void.

Pollock v. Farmers Loan & Trust Co., 158 U. S. 601.
Commonwealth v. Hatfield Coal Co., 186 Ky. 411.
Neutzel, Clerk, v. Williams, 191 Ky. 351.

It will, moreover, be observed that the 1917 Act is as violative of the 14th Amendment as is the Act of 1918, as above shown in this brief.

It is, therefore, submitted that the 1918 Act is plainly violative of the Commerce Clause; that the taxes exacted under it should be repaid; that the 1917 Act affords no justification for their retention by the State, and that the belated decision of the State Court after the rights of this plaintiff were fixed adjudging that such taxes were due under the 1917 Act, will not be controlling, nor impressive on this Court.

(c)

Act of 1918 Violates "Due Process" Clause of the Federal Constitution.

The Act of 1918 is void because it operates to exact a tax upon the oil assessed without affording the owner at any stage of the proceedings an opportunity to be heard.

The 14th Amendment to the Constitution of the United States provides that no person shall "be deprived of life, liberty, or property without due process of law."

Sections 2 and 11 of the Kentucky Constitution also protect the citizen against arbitrary power or deprivation of property unless by judgment or law of the land.

Under the Act, the transporter is given an opportunity to be heard as to the assessment of the oil, but he is not interested, nor does he represent the owner of the oil, on whom the burden of the tax falls.

It has never been questioned that even in the assessment and collection of taxes, summary in their nature as they may be, there must, under the above constitutional provisions, be some opportunity for hearing the taxpayer.

In Board of Levee Commissioners v. Johnson, 178 Ky. 287, Judge Carroll, in an exhaustive opinion, reviewed numerous decisions of the State Court and the Supreme Court and said, on page 302:

"But, although there is a distinction between the application of the rule of 'due process of law' and 'the law of the land' to ordinary Court proceedings, all of the Courts recognize that in tax proceedings, when the power of assessment or the authority to fix the value of the property to be subjected to a tax, or the amount of the tax that may be imposed, is lodged in some board created by legislation, the property of the taxpayer cannot be taken for the tax unless at some time in the course of the proceedings, and in some form or manner, before some person or body charged with the assessment or levy of the tax, he has an opportunity to be heard. In other words, the right of the taxpayer to notice and opportunity to be heard in tax proceedings is just as indispensable before his property can be taken for taxes as it is before his property can be taken to satisfy the judgment of a Court, the only difference being that notice of a suit in Court and opportunity to present his defense must conform to regular and established rules of procedure, while in tax matters, the notice and opportunity to be heard need not follow any established or settled practice or procedure, or be according to any uniform system of laws, but it may be varied according to the will of the Legislature in such manner as to the Legislature may seem best adapted to enable the taxing authorities to promptly assess, levy and collect the taxes needed for the governmental purpose in view."

In Turner v. Wade, 254 U. S. 64, 67, it is said:

"In considering certain sections of the Georgia tax laws this Court held in Central of Georgia R. Co. v. Wright, 207 U. S. 127, that due process of law required that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the validity of a tax and the amount

thereof by giving him the right to appear for that purpose at some stage of the proceedings. This case with others was cited with approval in Londoner v. Denver, 210 U. S. 373, 385, wherein we said that if the legislature of the state, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom the tax shall be levied, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice, whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 U. S. 385, and previous cases in this Court, cited on page 386. See also Coe v. Armour Fertilizer Works, 237 U. S. 413, 425."

See also Security Trust Co. v. Lexington, 203 U. S. 323.

The State Court avoided an express decision as to this question, saying that if the 1918 Act is void upon this ground, the 1917 Act is not, and that the tax would have been due under said 1917 Act.

We refer to our answer to this contention in a previous portion of this brief relative to the violation of the Commerce Clause, which is as applicable here, and it is therefore unnecessary to repeat.

It is therefore respectfully submitted that the judgment of the Court of Appeals of Kentucky herein should be reversed, that it should be held that both the Act of 1917, and the Act of 1918, are void and that no tax on the production of crude oil can be sustained un-

der either Act, and that the case should be remanded for further proceedings.

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APPENDIX.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY.

EASTERN GULF OIL COMPANY, - - - - - - *Plaintiff,*

vs.

KENTUCKY STATE TAX COMMISSION AND FRANK E. DAUGHERTY, ATTORNEY GENERAL, - - *Defendants.*

Before Denison and Moorman, Circuit Judges, and Cochran, District Judge.

Per Curiam:

This suit is here on motion for an interlocutory injunction. It is a three judge case and involves the validity of Chapter 122, Acts 1918, Kentucky, approved March 29, 1918, and carried into Sections 4223 c-1 to 4223 c-9, inclusive, of Carroll's Kentucky Statutes, 6th Ed., 1922. These sections constitute subdivision 1116, entitled "Oil Production," of Art. XII entitled "License Tax" of Chapter 108 entitled "Revenue and Taxation," of those statutes. The injunction, which is sought, is to restrain the defendant, Kentucky State Tax Commission, from assessing, collecting and certifying taxes and the defendant, Daugherty, Attorney General of the State, from instituting any prosecution against plaintiff, under the legislation referred to.

It is claimed by plaintiff that this legislation is in violation of both the federal and state constitution. It has been held by the Kentucky Court of Appeals not to be in violation of the state constitution.

Raydure v. Board of Sup'r. of Estill County, 183 Ky. 84.
Associated Producers Co. v. Board of Supervisors, 202 Ky. 538.
Swiss Oil Corporation v. Shanks, 208 Ky. 64.

These decisions are binding upon this court and it is not open for it to consider, whether it is in violation thereof.

Dawson v. Kentucky Distilleries & Whse. Co., 255 U. S. 288.

That court has not considered the question whether it is in violation of the federal constitution. In the Swiss Oil Corporation case it was urged upon it that it was in violation thereof, but it waived that question, holding that its determination was not necessary to the disposition of the case before it. The suit there was not, as here, to enjoin the taking of action under the legislation in question, but to recover taxes which had been paid thereunder. That legislation was, according to its title, an amendment to and re-enactment of previous legislation, to wit: Chapter 9 of Acts of 1917, Kentucky, approved May 2, 1917. It is not open to claim that the original legislation was in violation of the federal constitution and the same tax was due under it as under the existing legislation. If then, for this reason, the latter is invalid the original legislation is still in force and the taxes paid were due under it. Such then was the reasoning which led that court to hold that a determination of the federal question was not necessary to the disposition of that case.

That question is raised by this suit and the motion before us. As to whether the legislation in question violates the federal constitution depends upon its real nature and effect and, in determining what that is, this court is bound

to exercise its own judgment in regard thereto and be governed thereby. In the case of

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292,

it was said:

> "Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."

And in the case of

St. Louis S. W. R. Co. v. Arkansas, 255 U. S. 350,

it was said:

> "But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test to be found is the operation and effect of the law as applied and enforced by the state."

The particulars in which it is claimed by plaintiff that the legislation in question violates the Federal Constitution are two. It violates the provision conferring on Congress the power to regulate interstate commerce, in that it imposes a tax on oil produced by it after it gets and whilst it is in interstate commerce, and the due process clause of the fourteenth amendment, in that it does not provide for a hearing of plaintiff by the defendant Commission as to the value of such oil. In determining the real nature and effect thereof, it is essential that a determination be first had of the real nature and effect of the original legislation, to wit: the Act of 1917. There can be no question that the tax which is imposed was an occupational tax. Its title is in these words:

"An act imposing a license or franchise on any person, firm, corporation or association engaged in the production of oil in this state and *authorizing counties* also to impose such tax for road, school and county purposes; providing methods of determining the amount of tax due and prescribing penalties for a violation of the provisions of the act."

Here it is expressly characterized as a "license or franchise" tax imposed upon those "engaged in the production of oil in this state."

The first section is in these words:

"Every person, firm, corporation or association engaged in the business of producing oil in this state, by taking same from the earth, shall, in lieu of all other taxes on the wells producing said oil imposed by law annually, pay a tax for the right or privilege of engaging in such business in this state equal to 1 per centum of the market value of all oil produced in this state, and such tax shall be for state purposes, and in addition, any county in the state may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of one per centum of the market value of all oil produced in such county, and the fiscal court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected and when oil is produced, in any separate taxing district in a county, the Fiscal Court shall equitably distribute such taxes between the county and such taxing district."

It will be noted that those on whom the tax is imposed are described as "engaged in the business of producing oil in this state"; and that the tax is imposed "for the right or privilege of engaging in such business in this state."

The tax which is imposed is measured by "the market value of all oil produced in this state."

In the case of

Brown-Forman Co. v. Commonwealth, 125 Ky. 402,

it is held that an occupational tax can be measured by the quantity of that which is produced by the person taxed, i. e., in the exercise of the occupation because of which he is taxed. This decision was affirmed by the Supreme Court.

Brown-Forman Co. v. Kentucky, 217 U. S. 563.

It was held by the Court of Appeals of Kentucky in the earlier case of

Strater Bros. Tob. Co. v. Commonwealth, 117 Ky. 604,

that such a tax can be measured by the value of that which is so produced.

There is another clause in this section which calls for interpretation. It is that in which it is said that the tax imposed is to be "in lieu of all other taxes on the wells producing said oil imposed by law." The question which this clause raises is as to what were the taxes which were had in mind in lieu of which the occupational tax is imposed. In considering this question two things should be borne in mind. One is that the occupational tax imposed by the Act has relation to developed or producing oil grants. It has no relation to grants which have not been developed and are not producing oil in paying quantities. The taxation of the latter grants, where they are owned by non-residents of the counties where the real estate covered by them is located, whether non-residents of the state or not, is provided for by Section 4039, Carroll's Kentucky Statutes, 6th Edit., 1922. And where owned by residents of such counties their taxation is provided for in Section 4020 thereof as held in Raydure v. Board of Sup'rs. of Estill County, supra. Those provisions are not limited to non-developed grants, but embrace developed grants as

well. However as to the latter the taxation would seem to be of the oil in place and not as produced.

Wolfe County v. Beckett, 127 Ky. 262.

The other thing referred to is the nature of the interest of the grantee in an oil lease which should preferably be termed a grant. The Supreme Court has held that he has no interest in the oil in place, but only a right to search for it and to produce it if found. This is so held on the ground of the fugacious nature of oil.

Ohio Oil Co. v. Indiana, 177 U. S. 190.

This court fell in with this view in the case of

Lindley v. Raydure, 239 Fed. 928, 933.

In this state, however, this is not the law. The grantee acquires ownership of the oil in the land as well as such right. And the effect of the grant is to sever the oil from the remainder of the land.

Wolfe County v. Beckett, supra.
Raydure v. Board of Sup'rs of Estill Co., supra.

This is the law as held by the majority of the courts, according to the note in 29 A. L. R. 586.

We come now to the question as to what are the taxes had in mind in lieu of which the occupational tax is imposed. It is the taxes "on the wells * * * imposed by law." The Standard Dictionary defines a well to be "a hole or shaft sunk into the earth in order to obtain a fluid as water, oil brine, or natural gas, from a 'subterranean supply.'" But of course the word "wells" in that clause is not to be taken literally. It was not taxes imposed on holes drilled to find oil and from which oil is produced, if found, in lieu of which the occupational tax was imposed. That word as thus used stands for something else and the

question is what does it stand for. It can stand for the oil produced from the wells. But it does not stand for that because the taxes on the wells in lieu of which the occupational tax is imposed are taxes "imposed by law." And there was then no production tax on oil in this state, i. e., a tax imposed on oil after it has been produced. It can only stand for the oil in place covered by the grants upon which the wells are located and the right to produce such oil from these wells, as we have seen, taxes were "imposed by law."

That such was the meaning of the clause is evidenced from the opinion in the case of Wolfe v. Beckett, in the light of which that clause is to be interpreted. The main question involved there was as to the assessability of developed oil grants. The items in the assessor's list, prepared by the state and furnished the taxpayer under which the grants were listed, was "Coal Mines, Oil, Gas and Salt Wells." That question was thus put, "Are oil and gas wells held under lease taxable?" It was held that they were assessable. But what it was held was assessable was not the wells or the oil produced from the wells. It was the oil in place in the land covered by the grants upon which the wells were located and the right to produce such oil therefrom. Here, both in the tax list and in the opinion of the court the word "wells" was treated as standing for such oil in place and such right. And it would seem that in the light of this opinion that the word "wells" in the clause in question stands therefor and nothing else. The only tax "imposed by law" in lieu of which the occupational tax could be imposed was a tax on the oil in place and such right.

The question under consideration is not whether the legislature could constitutionally impose an occupational tax in lieu of such property tax. It is what the legislature meant. Of course if it could not constitutionally do this that circumstance has a bearing on the question of what is

meant. Because thereof it should not be held that it meant this if there is any reasonable escape from so holding.

So much then as to the first section of the Act of 1917. It has eight other sections. Those sections have to do with the determination of the value of the oil produced, which is the measure of the amount of the tax to be paid and the payment of the tax. By section 2 it is provided that the State Tax Commission shall determine such value and that it shall certify its valuation to the County Court Clerk. It provides that such determination shall be made from the reports provided for in Sections 7 and 8 and such other information as it may obtain. By Section 3 provision is made for the State Tax Commission notifying the taxpayer of its valuation and for a hearing in regard thereto before it at his instance. Section 4 provides the time of payment of the taxes and a penalty for non-payment. Section 5 provides for the certification of the county taxes to the Sheriff for collection. Section 6 provides that the state taxes shall be paid to the State Treasurer and the county taxes to the Sheriff. Section 7 provides that the taxpayer shall make report to the State Tax Commission of the oil produced by him on the first day of July, 1917, and every three months thereafter on blanks furnished by the State Tax Commission and prescribes a penalty for not making them. Section 8 provides that every pipe line company doing business in the state shall, at the same time, make report on such blanks of the oil received by it and prescribes a penalty for not so doing. Section 9 related to the blanks to be so furnished and provided who should make the reports called for by Sections 7 and 8 and the prosecution for the making of a false report.

It is clear, therefore, that what the Act of 1917 provided was an occupational tax to be measured by the oil produced and that this tax should be in lieu of the property tax for which he was liable on account of his owner-

ship of the oil in place and the right to produce same from the wells located on his grant. Whether the state legislature could, under the state constitution, so provide, and, if not, the effect of its inability so to do—whether it overthrow the whole statute or only in part—it is not for us to say. We are only concerned with a right interpretation of the Act and this, in order to get the right point of view from which to interpret the statute of 1918, on whose correct interpretation, the question whether it violates the federal constitution in either of the particulars claimed depends. For in interpreting a document its subject matter must be looked at from the right point of view. There is but one method of interpretation of a document and that is the historical method. One, however, in using it should bear in mind that it is possible for one to be too proud of such method.

It should be noted in passing that there was nothing in this Act infringing upon the federal constitution.

This brings us to the Act of 1918 which is directly involved here. The title thereof is in these words:

> "An Act to amend and re-enact Chapter 9 of the Acts of the extraordinary session of the General Assembly of 1917, which Act imposed a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this State, and authorizing county officials to impose such tax for roads, schools and county purposes; providing methods of determining the amount of tax due and prescribing the manner of payment of state tax and imposing penalties for the violation of the Act."

It is to be noted that the Act which it says imposes a license or franchise is not that of which it is the title, but of the earlier one. The description of the former is that it is an Act "to amend and re-enact" the latter. It will be

seen when we come to consider the provisions thereof that it does not re-enact any of the provisions of the previous Act and only amends the first section thereof. What it does is to substitute ten entirely new sections for the eight sections following that first section and to amend it. The amendments to the first section have significance and, when considered in connection with the remaining ten sections, it is well nigh impossible to resist the conclusion that what the Act of 1918 does is to substitute an entirely different tax for that provided for in the Act of 1917, i. e., a property tax for an occupational one. Note will first be taken of the amendments to the first section of the Act of 1917. The first section of the Act of 1918 is in these words:

> "Every person, firm, corporation or association producing crude petroleum oil in this state shall, in lieu of all other taxes on the wells producing said crude petroleum, annually pay a tax equal to 1 per centum of the market value of all crude petroleum so produced and such tax shall be for state purposes and, in addition, any county in the state may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of one per centum of the market value of all crude petroleum produced in such county, and the fiscal court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected and, when crude petroleum is produced in any separate taxing district in a county the fiscal court shall equitably distribute such taxes between the county and such taxing district."

The changes made in the first section of the Act of 1917 by this section, apart from the changes in the name of the substance from that of oil to "crude petroleum," consist entirely in omissions and there are four of them. The words "engaged in the business of" and "by taking same

from the earth" are omitted, so that instead of reading "every person, firm, corporation or association, engaged in the business of producing oil in this state by taking same from the earth," it reads "Every person, firm, corporation or association producing crude petroleum oil in this state." The words "imposed by law" are omitted, so that instead of reading "in lieu of all other taxes on the wells producing said oil imposed by law," it reads "in lieu of all other taxes on the wells producing said crude petroleum." And finally the words "for the right or privilege of engaging in such business in this state" are omitted, so that, instead of reading "annually pay a tax for the right or privilege of engaging in such business in this state equal to 1 per centum of the market value of all oil produced in this state," it reads "annually pay a tax equal to 1 per centum of the market value of all crude petroleum so produced."

There is hardly room to say that these omissions were unintended. They must have been made of purpose. Possibly they may have been omitted because unneeded, *i. e.*, surplusage. But it is hard to account for the last one on this ground. It is the most significant one of them all. If the thought of the Act was that the tax imposed was not an occupational tax, as under the Act of 1917, but a property tax this accounts for the omission. It looks as if the omission was because it was conceived that the tax imposed by that Act was not for the right and privilege of engaging in the business of producing crude petroleum, as in case of the tax imposed by the Act of 1917. If not that, what other tax can it be than a tax on the crude petroleum produced, *i. e.*, a property tax. With this coincide the first two omissions. They indicate that the eye of the section was fixed on what is produced and not on the business of producing it or the act of taking it from the earth. This view of the section makes it conform to the other ten sections, which are entirely new, and take the place of the eight later sec-

tions of the Act of 1917, as will shortly appear. It is not so easy to account for the other omissions, to wit: the words "imposed by law." It may have been made because those words were mere surplusage, i. e., added nothing to the thought of the section. They made certain that the taxes in lieu of which the occupational tax was imposed by the Act of 1917 were taxes imposed by existing law. Possibly one tax cannot be said to be imposed in lieu of another tax unless such other tax is imposed by existing law. This omission, therefore, may not be stressed. But, as will be seen later, this in lieu clause was afterwards construed to mean what it could hardly have been held to mean had the omission not been made and it had been worded exactly as it stood in the first section of the Act of 1917.

This first section provided that the producer shall pay the tax, but the other ten sections provide for its payment by the pipe line company, which is termed all through these sections "the transporter." It is the transporter who is primarily liable for and to pay the tax with the right to reimburse itself from the producer. The contemplation of the first section, therefore, is that the producer shall pay the tax only secondarily, i. e., to the transporter. It is to the transporter and to it alone that the state and the counties look for the payment of their taxes. And, as will be seen, so far as it is concerned, the tax is a property tax and not an occupational one.

By Section 2 provision is made for a county, which imposes a tax, as authorized by the first section, giving notice to the transporter of such imposition and for the transporter collecting the tax and paying it to the sheriff in the manner and at the time payment of such taxes shall be required to be made to the State Tax Commission. It also provides for a certification of the imposition of the tax to the State Tax Commission which is to make assessment therefor, in the same manner and at the same value as pro-

vided for the state tax and a certification of such assessment to the county for collection.

Section 3 is in these words:

> "The tax hereby provided for shall be imposed and attach when the crude petroleum is first transported from the tanks or other receptacles located at the place of production."

According to this the tax is now imposed and does not attach as long as the oil is in the possession of the producer. It is imposed and attached only when it is first transported, *i. e.*, removed from its possession and the act of transportation has begun.

By Section 4 each transporter is required to register in the Clerk's office in each county, in which it carries on the business of transportation, in a book furnished by the State Tax Commission and the County Clerk is required to certify such registration to the State Tax Commission.

Section 5 provides that each transporter shall make monthly reports to the State Taxing Commission, showing the quantity of each kind or quality of petroleum received from each county, the market value thereof, and any sales thereof, on blanks furnished by the State Tax Commission. It requires no report of the producers, whose petroleum it has received and transported or of their respective interests in the petroleum transported by it. The report covers merely the quantity received each month without any reference to whom it belongs. The State Tax Commission has nothing to do with the producers and has no dealings whatever with them. The dealings with the producer are by the transporter and by it alone.

Section 6 makes provision for the assessment by the State Tax Commission of the value of the petroleum so received by the transporter upon the reports made by it as provided in the preceding section and such other reports

and information as it may secure. The provision is that the Commission shall "assess the value of all grades or kinds of crude petroleum so reported," notifying each transporter of "such assessment," and certify "such assessment," to the County Clerk of each county who is immediately to deliver a copy thereof to the sheriff for the collection of the county tax from the transporter. Provision is made for a hearing by the Commission of the transporter "on any objection to such assessment." No provision is made for the hearing of the producer. It is not regarded that he has any concern in the matter. It further provides the manner in which the Commission "shall make the assessment of the value of the crude petroleum so reported by each transporter of crude petroleum." It is as follows:

> "Where the report shows no sale of crude petroleum during the month covered by such report, then the market value of crude petroleum on the first business day after the tenth day of the month in which the report is made shall be fixed as the assessed value of all crude petroleum covered by such report.
>
> "But where the report shows sales of crude petroleum during the month covered by each report, if it shows that all crude petroleum so reported has been sold, then the market price of such crude petroleum on each day of such sale or sales shall be the assessed value of all crude petroleum sold on such date of sale and the total amount of the tax to be reported as the assessment on such report shall be the total of the assessment or assessments made on such sale or sales; but if such report shows that any part of the crude petroleum so reported remains unsold, then as to such portion remaining unsold the market price of the crude petroleum on the first business day after said tenth day of the month following the month covered by such report shall be fixed as the assessed value of such portion of the crude petroleum unsold, and the total

amount of the tax to be reported as the assessment on such report shall be the total of the assessments made on such sold and unsold crude petroleum."

Section 7 provided that the transporter "shall be responsible and liable for the taxes as herein set forth on all crude petroleum so received by it and shall collect from the producer in either money or crude petroleum the taxes imposed under the provisions of this act; but, if collection is in crude petroleum, each transporter is authorized and empowered to sell the same, and pay said taxes by check or cash to the State Tax Commission."

Section 8 provides that the State Tax Commission may require reports from all producers and transporters in addition to those theretofore provided for "as it may deem necessary from time to time."

Section 9 prescribes a penalty against a transporter for failure to make reports, to pay taxes or to register as required by the Act.

Section 10 repeals all acts and parts of acts in conflict therewith.

Section 11 contains an emergency provision.

It is clear therefore, that what these later sections, i. e., those after the first, provide is for the payment of taxes by the transporter on the crude petroleum transported by him and hence a property tax. The first section is to no extent in conflict therewith, and seems to have been changed by amendment from what it was in the Act of 1917, in order to conform thereto as heretofore pointed out. What we have then in this Act is a tax levied against a custodian of personal property, analogous to the tax assessed against distillery warehousemen on account of whiskey in their possession but not owned by them, as provided in Article 6 of the Chapter entitled "Revenue & Taxation," Kentucky Statutes, which has been held to be valid.

Carstairs v. Cochran, 193 U. S. 10.
Anderson v. Kentucky Distilleries & W. Co., 146 Fed. 999.
Thompson v. Commonwealth, 123 Ky. 302.
Thompson v. Commonwealth, 209 Ky. 340.

The difference between that case and this is that here the transporter is engaged in interstate commerce and the crude petroleum taxed against it is being transported in interstate commerce.

This interpretation of the Act of 1918, runs counter to that of the Court of Appeals of Kentucky in each one of the three cases of Raydure v. Board of Sup'rs. of Estill County, supra, Associated Producer's Co. v. Board of Supervisors, supra, and Swiss Oil Corporation v. Shanks, supra. Whilst as heretofore stated, it is our duty to be governed by our own interpretation of the real nature and effect of the tax imposed thereby it is due to that court from which we feel constrained to differ, to take note of the basis of its position and consider how persuasive it is. Then it is always helpful to consider a view contrary to one's own position. It enables him to make sure thereof and define it more clearly. In the Raydure and Associated Oil Producer's cases the main, if not only question involved, was as to the meaning and validity of the in lieu clause of the first section. In interpreting that clause it was dealt with, as it is in the Act of 1918, and not as it is in the Act of 1917, i. e., as reading "in lieu of all other taxes on the wells producing said crude petroleum" and not "in lieu of all other taxes on the well producing said oil imposed by law." It thus was not brought forcibly before the court that the tax, in substitution of which the tax called for by the Act was imposed, was a tax imposed by existing law. In the Raydure case, the Board of Supervisors of Estill County had assessed all of Raydure's oil grants outside of five acres around each producing well. It took the portions

thereof covered by the five acres as the only portions drained by the wells. In other words it took such portions to be the developed portions of the oil grants and all outside thereof as the undeveloped portions. It was the undeveloped portions which they had assessed. This assessment was ad valorem and in order to a collection of a property tax thereon. It was of this assessment and of it alone that Raydure complained. He did not complain of the tax imposed by the Act of 1918. Amongst other grounds upon which he attacked the assessment was that the property assessed was covered by the "in lieu" clause and hence was not assessable. This raised both the question of the meaning of the clause and its validity under the state constitution. And the court held that it did not cover the undeveloped portion of an oil grant, i. e., that the word "wells" therein stood for the developed portion of an oil grant. It further held that if it covered the undeveloped portion it was in violation of the state constitution, because though thereunder it is allowable for the legislature to add an occupational tax to a property tax, it is not allowable for it to substitute the one for the other. Neither one of these holdings was a dictum. The latter as much as the former was a matter decided. The latter holding rendered the in lieu clause unconstitutional also as to the developed portion of an oil grant, which it was taken to cover, as much so as to the undeveloped portion had it been broad enough to cover it. An occupational tax could no more be substituted for such property tax than for the other. The question, however, as to the validity of a property tax on the developed portion was not before the court and the effect of what had been held as to its validity was not clearly perceived. So the court concluded its opinion with this paragraph:

> "On a return of the case the court should hear evidence and find the fair cash value of each lease, ex-

> cluding the value of each producing well thereon estimated at the price it would bring at a fair voluntary sale and then assess it. The quantity of land that should be excluded in connection with each well we express no opinion concerning."

The case also involved the nature of the interest of a grantee in an oil grant and in disposing of that question the decision in the case of Wolfe v. Beckett, supra, was considered and followed. That the decision in that case had a bearing on the interpretation of the in lieu clause was not realized. Had the court realized and read the clause as it is in the Act of 1917, it might have held that the word "wells" in that clause stood not merely for the developed portion of an oil grant but for the entire oil grant, upon which producing wells are located, and based its decision solely on the unconstitutionality of the in lieu clause.

Such then was what was decided in that case and all that was decided. It did not involve the meaning of the Act of 1918, as to the nature of the tax imposed by it or its validity. That tax was not in question in the case. The only tax in question was the property tax on what was taken to be the undeveloped portions of the Raydure grants. Whatever may have been its nature, the in lieu clause was invalid if it covered such portions thereof. It is not allowable for the legislature to exempt such property from an ad valorem tax on any ground whatever. This perhaps should be qualified. Possibly the legislature may provide for an oil production tax, i. e., a tax on the oil as produced and further provide that such a tax may be in lieu of any tax on it in place so as not to tax it twice. But otherwise it was entirely immaterial to the case as to what was the nature of the tax imposed by the Act or as to its validity.

The court, however, did consider the nature of the tax so imposed, possibly on the ground that it had a bearing

on the interpretation of the in lieu clause, though it did not pass on its validity, as that was not involved and could not be. It held it to be an occupational tax. It said:

> "The tax provided for in this legislation was a license tax on the business and not a property tax."

In the course of the opinion it referred to the tax, interchangeably, as an "oil production tax" and "a license tax." It is once referred to as "a license tax on the business of engaging in the production of oil," but it is more frequently referred to as an "oil production tax." There would seem to be confusion here, for, strictly speaking, an "oil production tax" is a property tax and not an occupational one, i. e., it is a tax on the oil as produced and not whilst in place. The distinction between the two comes out in the case of

Heisler v. Thomas Colliery Co., 260 U. S. 245.
Oliver Iron Mining Co. v. Lord, 262 U. S. 172.

The one involved a coal production tax, i. e., a tax on coal produced at its value when ready for shipment or market. The other involved a tax upon the occupation of producing ore, the tax to be measured by its value "where it was brought to the surface of the earth." In the last case it was said:

> "We think the tax in its essence is what the act calls it—an occupational tax. It is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore which consists of severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts."

It was held in each case that the tax was not a regulation of interstate commerce and, therefore, valid.

The sole basis for the position which the Kentucky Court of Appeals took, as to the nature of the tax, is thus stated:

> "This (i. e., that the tax was an occupational and not a property tax) is made plain by the title of the Act of 1917, which reads "An Act imposing a license tax or franchise on any person, firm, corporation or association engaged in the production of oil in this state and authorizing counties also to impose such tax. . . . : providing methods of determining the amount of tax due. . . . and by the title of the Act of 1918, which is an amendment of the Act of 1917, and recites that it is an "An Act to amend and re-enact. . . . the Acts. . . . of 1917, which imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this State, thus showing very plainly the nature and purpose of the Act."

It was not noted that the description of the act, as one imposing a license or franchise tax, was confined to the title of the Act of 1917. The description of the Act of 1918, in its title, was not as one imposing any tax, but as an amendment and re-enactment of the Act of 1917. In what particular it changed the former act and its exact nature other than its relation to that act is not obtained from its title. That can only be obtained from the body of the act itself. The description of the act of 1917, in its title was correct. That, in the Act of 1918, in so far as it described it as a re-enactment of the Act of 1917, was not correct, as we have seen. It re-enacted no provision of the Act of 1917, and, on the contrary, radically changed its nature. No other reference to the original acts was made than to their titles. If it were not for this reference one would think that the Court did not have before it either Act in its original form, but only the Act of 1918, as carried into the Kentucky Statutes, for its attention was concentrated on

the first section thereof as embodied in the Kentucky Statutes, to wit, Section 4223 C-1. It is the only portion to which it made reference. It is, therefore, true to say that the Act of 1918 was not construed by the court as a whole. The effect of the ten later sections on the construction of the first section, as showing that the tax thereby imposed was not primarily payable by the producer was not conceived of. Still further so far as the Act of 1918 was concerned it was not construed from the point of view of the Act of 1917. It was not realized how apt that Act was in imposing an occupational tax, i. e., how every one of its provisions conformed to that conception of it and how radically different therefrom is the Act of 1918, and that in every section thereof. No notice was taken of the striking omissions from the first section of the Act of 1918, of certain language used in the first section of the Act of 1917, the reasonable explanation of which is that it was not intended that the tax imposed by the Act of 1918, should be a tax "for the right or privilege of engaging in the business" of producing crude petroleum, i. e., an occupational tax, as was the tax imposed by the Act of 1917, but a tax on the crude petroleum produced, i. e., a property tax, and that in the hands, not of the producer but of the transporter, to which conception thereof all the other sections conform.

After the decision in the Raydure case the taxing authorities were not long in perceiving that, under the reasoning of that case, the developed portion of an oil grant, as well as the undeveloped, was subject to a property tax and they acted accordingly. It was out of this situation that the Associated Producers Company case arose. That case, just like the Raydure case, involved the question as to the meaning and validity of the in lieu clause. This was the only question which it did involve. It did not involve any question as to the nature of the tax imposed by the Act of 1918, or its validity. It could not have been in-

volved, for the Associated Producers Company was not complaining of that tax. It was complaining of the property tax on the developed portion of its oil grants. And the validity of that tax depended on the meaning and validity of the in lieu clause and nothing else. It could not escape that tax unless that clause covered such property tax and it was constitutional for it to do so. The court held against the Associated Producers Company on both questions. It held that the legislature had no power to relieve it of such property tax and furthermore that it did not intend to do so, as the in lieu clause did not cover it. It construed that clause to mean that "there should be no other license tax." What it did in effect was to substitute for the words of the clause, to wit: "in lieu of all other taxes on the wells" the words "in lieu of all other license taxes." This it could hardly have done had it had before it the clause as it was in the Act of 1917, i. e., "in lieu of all other taxes on the wells. . . . imposed by law." The only taxes imposed by law were property taxes which covered both the developed and undeveloped portions of an oil grant. There was no license taxes imposed by existing law in lieu of which the tax called for by the Act could be imposed.

Both these matters, to wit, the invalidity of the in lieu clause, if it covered the developed portion of an oil grant and the meaning thereof were points decided in the case. Neither holding was a dictum. It would seem, however, to follow that, if the construction put upon the clause was sound, the tax imposed by the Act was valid, under the state constitution, as there was no reason on this view of it for holding it invalid. In no other way did the decision in that case have any bearing on the validity of the tax imposed by the Act of 1918.

But the court, as in the Raydure case, passed on the nature of the tax imposed by that Act and followed it in holding that it was an occupational tax. It confined its

consideration to the Act of 1918, and, as to it, to its first section as constituted in the Kentucky Statutes, to wit, Section 4223 c-1. It did not construe that Act as a whole or look at it from the point of view of the Act of 1917. This is what it said:

> "It is clear from the statutes (Section 4223 c-1), no less than from the opinion in the Raydure case, supra, that the tax intended to be imposed was merely a production or license tax. It could be nothing more."

And again:

> "The section of the statute to which we have reference relates merely to a production or excise tax so we held in the Raydure case, supra."

Here we have also, as in the Raydure case, a production tax and a license or excise tax treated as the same. Beyond question the holding in this case that the developed portion of an oil grant, as well as the undeveloped portion, was subject to the property tax and that it was not relieved therefrom by the in lieu clause was right and no exception can be taken thereto.

The Swiss Oil Corporation case was the first of the three to involve the validity of the tax imposed by the Act of 1918. It was directly involved in that case, because it was a suit to recover the tax which had been paid. The question of its validity under the federal constitution was waived as heretofore stated. It was held to be valid under the state constitution, and that not on the merits, but, because of the decisions in the other two cases and the action taken by the taxing authorities and taxpayers in pursuance of them. We would submit, however, that the validity of this tax was in no wise involved in either of those cases. What was involved therein was the validity of the in lieu clause. The question as to the validity of

that clause was not the same as that as to the validity of the tax imposed by the Act. It was held that the clause was valid in both cases. It was so held, in the Raydure case, because it was considered that that clause did not cover the undeveloped portion of the oil grant, and, in the Associated Producers Company case, because it was considered that the in lieu clause did not cover a property tax and was limited to other license taxes, which might thereafter be imposed. So far as the decision in the Raydure case is concerned, though it had no bearing on the validity of the tax in question, the court's acquiescence in the position that the in lieu clause covered the developed portion of an oil grant may be said to have had a bearing on the validity of the tax. Its bearing, however, was against its validity and not in favor thereof. If it did cover such portion of an oil grant it was invalid and its being invalid rendered the tax invalid, not because it was unconstitutional, but because the legislature did not intend to impose the tax except in lieu of the property tax.

But the decision in the Associated Producers Company case, though it did not involve the validity of the tax in question, had a bearing on its validity. If the construction placed upon the in lieu clause was sound, i. e., that it only covered license taxes, that might afterwards be imposed, then the tax imposed was valid under the state constitution, if of the character which it was held to be. There was no ground to hold it invalid.

What the court was really confronted with in the Swiss Oil Corporation case, was whether it would stand by this construction. This it in effect did. It held the tax to be an occupational tax and to be valid as such under the state constitution. In considering its nature, as in the Associated Producers Co. case, it confined itself to the consideration of the Act of 1918, and, as to it, to its first section as contained in the Kentucky Statutes, to wit, Section 4223 C-1.

It did not construe that Act as a whole or look at it from the point of view of the Act of 1917. Indeed in portions of the opinion that section is treated as if it constituted the whole of the Act of 1918. It is said:

> "Section 4223 C1 of the statutes, under which the taxes that appellant seeks to compel the auditor to refund were laid and collected, is an Act of the 1917 Session of the Legislature as amended at the 1918 Session."

And again:

> "This conclusion disposes of appellant's contentions that the Act of 1917, as amended, in 1918, now Section 4223 C-1 of the statute imposes a property tax rather than a license tax."

We find nothing, therefore, in these three cases to change our view as to the real nature of the tax in question, which view has been arrived at by construing the Act of 1918 as a whole and that from the point of view of that of 1917.

It remains to consider and determine whether the Act is in violation of the federal constitution. We limit ourselves to the claim that it violates the interstate commerce provision thereof. We conclude that it does. It does so, because it imposes a tax on the procurer's oil after it gets and whilst it is in interstate commerce. According to the allegations of the bill, which are not questioned, the producers pump the crude petroleum directly from the wells to tank receptacles and then deliver the oil directly from those receptacles into the pipe lines of the transporters, and same is transported by them immediately and directly from those receptacles without any intervening handling, storage or delay in continuous flow in interstate commerce to destinations and for sale and distribution in states other than Kentucky. The tax attaches after the crude pe-

troleum has left the possession of the producers and come into the possession of the transporters and has become an article being transported in interstate commerce. According to Section 5 it attaches when it is "first transported from the tanks or other receptacles located at the place of production." That the imposition by a state of a tax on an article being transported in interstate commerce is a regulation of such commerce, and, therefore, invalid, is well settled.

In 26 R. C. L., Section P 130, Section 105, the law is thus stated:

> "Goods being carried in interstate commerce are not taxable by a state while they are actually in transit."

The matter is thus put by Mr. Justice Moody, in a dissenting opinion in the case of

General Oil Co. v. Crain, 209 U. S. 211:

> "Cases of taxation upon property before it has entered the channels of interstate transportation or after the transportation has ended, seem to me to have no application. In the former class the property is taxable because it has not ceased to be a part of the mass of property of the state; and in the latter class, because it has come to rest as a part of the mass of property of the state. Between those two points of time it is exempt from the taxing power of the state."

This is all the more so, if it should be so that after the oil leaves the possession of the producer and passes into that of the transporter in interstate commerce, it becomes the property of the latter and the latter becomes accountable to the former for its value. The possibility of such being the case was intimated by the Supreme Court in the case of

Eureka Pipe Line Co. v. Hallinan, 257 U. S. 265.

It said:

> "It does not seem to matter, for the question before us whether the delivery to the pipe line be regarded as making it the owner of what it receives and a debtor for the amounts as in the case of a bank or as akin to those transactions that are held to make the recipient a bailee of the mingled mass and the bailor tenant in common as seems to have been assumed. Whether debtor or bailee the pipe line controls the movement of any specific oil in its hands and the bailor assents to its doing so."

That the Pipe Line Company is not here complaining of the imposition of the tax is unimportant. The plaintiff's interest therein is sufficient to entitle it to be heard on the matter.

If, however, we should be mistaken in our view of the nature of the tax, and it is an occupational and not a property tax, still the legislation cannot be upheld. The amount of the tax to be paid is measured by the value of the oil produced, not whilst it is in the producer's possession, but after it has left its possession and passed into that of the transporter and has become an article in interstate commerce. All that saved the occupational tax in the Oliver Iron Mining Co. case above was that the amount to be paid was measured by the value of the ore when it was brought to the surface of the earth, and before it had passed into interstate commerce.

It must be held, therefore, that the plaintiff is entitled to the interlocutory injunction sought.

A. C. DENISON,
CHARLES H. MOORMAN,
A. M. J. COCHRAN,
Judges.

March 31, 1926.

A Copy Attest:
J. W. MENZIES, *Clerk*,
By S. FINNELL, *D. C.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 146.

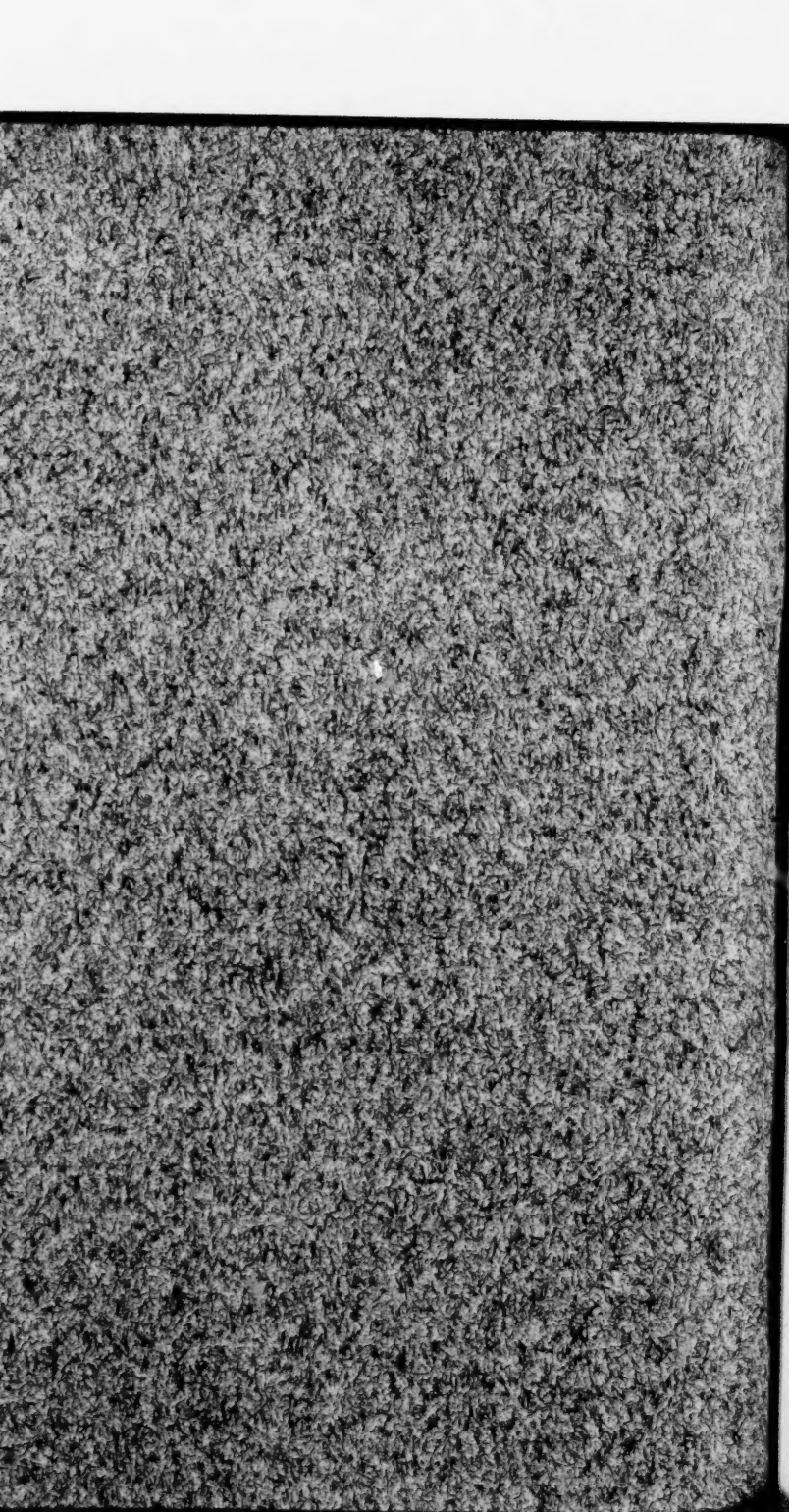
SWISS OIL CORPORATION, Plaintiff in Error,

vs.

WILLIAM H. SHANKS, Auditor of Public Accounts of the State of Kentucky.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

A. O. STANLEY,
E. L. McDONALD,
Counsel for Plaintiff in Error.



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(31,279.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 148.

SWISS OIL CORPORATION, PLAINTIFF IN ERROR,

vs.

WILLIAM H. SHANKS, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

I.

It is the contention that the tax imposed by the act is not a property tax.

The only authorities cited in support of this proposition are the Kentucky cases, in which it is said that the tax is a license tax.

There is no consideration of the differences between a property tax and a license tax. No attention is paid to the numerous cases cited by us asserting that the Supreme Court, in considering constitutional questions involved in cases of this character, will determine for itself the nature and effect of the tax, irrespective of its description or classification by the State courts. Neither legislature nor court can, by calling it a license tax, convert into such license tax one which is directly imposed upon all oil produced, when first transported, irrespective of its ownership. The legislature in the 1918 act, in the emergency clause, frankly refers to it as a "tax on crude petroleum," and there is nothing in the body of the act from which it could be suspected that it was anything else.

II.

It is next contended for defendant in error that the Kentucky court properly construed it as a license tax imposed in addition to the *ad valorem* tax, because this was the only construction which could be given it so as to avoid conflict with provisions of the Kentucky Constitution, which do not permit the substitution of a license for the *ad valorem* tax required on all property. That such substitution of a license or production tax for the existing *ad valorem* tax was desired and intended by the legislature is not only clearly evident from the language of both acts of 1917 and 1918, but stands admitted in the pleadings in this case.

The cases cited in support of the contention are to the effect that where a statute is reasonably susceptible of two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution; but they do not justify the distortion of language, which is plain and clear, to mean something entirely different from its ordinary meaning; nor will such necessity to conform to constitutional requirement authorize the court to practically amend the legislative act.

The subject was recently considered by the court in the case of Yu Cong Eng *v.* Trinidad, 46 S. C., 619 (decided June 7, 1926), in which it was said (page 623):

> "(2) The main objection to the construction given to the act by the court below is that in making the act indefinitely mandatory instead of broadly prohibitory it creates a restriction upon its operation to make it valid that is not in any way suggested by its language. In several cases this Court has pointed out that such strained construction, in order to make a law conform to a constitutional limitation, cannot be sustained."

III.

It is next contended that the Supreme Court will usually accept the construction of a State statute given it by the highest court of that State.

This is true as to the mere construction of statutes, but, as said in St. Louis, L. & S. W. R. Co. *v.* Arkansas, 235 U. S., 350, 362:

> "But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court."
>
> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

Another instance where the decision of the State court will not be regarded as controlling is where, as in this case, rights have accrued before a decision of the State court on the question involved.

Kuhn *v.* Fairmont Coal Co., 215 U. S., 349.

The *dicta* in the Raydure and Associated Producers Company cases to the effect that the tax on oil was a license tax, under the compulsion of making it conform to the State Constitution, will not be controlling on this Court, as describing the nature and effect of the tax; nor will this Court regard as either controlling or persuasive the decision of the State court in this case, rendered after the rights of the plaintiff in error accrued, holding the tax valid; not so much upon a consideration of the merits, but because it was in accord with the *dicta* in previous cases, and because, as the court said, without any foundation in the record, the State's finances and business of oil producers had been adjusted thereto.

If such State decisions were controlling on this Court in cases involving rights under the Federal Constitution, it can be readily imagined that this Court would become inferior in power to the State courts.

See

Hanover Fire Ins. Co. *v.* Carr, 47 S. C., 179, 183, decided Nov. 23, 1926.

IV.

It is also contended that this Court has upheld similar license-tax laws in Kentucky and other States, but it is readily seen from an examination of the cases cited that the laws upheld were not at all similar to the law here in question.

In Brown Forman Co. *v.* Kentucy, 217 U. S., 563, the act was found to have the incidents and effect of a license tax, the payment of which was a condition precedent to a continuance of the business. Here are none of the ordinary incidents of a license, but a direct imposition upon property.

So in Clark *v.* Titusville, 184 U. S., 329, there was no question as to the nature of the tax.

In Oliver Iron Co. *v.* Lord, 262 U. S., 172, the court had no difficulty in finding the tax in question an occupation tax, both from what the act called it and from its incidents and effect.

Counsel do not refer to the so-called whiskey-license tax, almost identical in its nature to the law here involved, which was held in Dawson *v.* Ky. Distillery & Warehouse Co., 255 U. S., 288, nor to other similar

cases heretofore cited by us in which such laws were held void.

V.

It is contended that the act does not violate the Fourteenth Amendment.

The State only contends that if the tax may be sustained as a license or occupation tax, it does not violate the Constitution in respect of denying the equal protection of the laws.

Our contention, however, is that, in its essence as well as according to the terms of the act, the tax is a direct imposition on property and not a license tax on any occupation; and it is not contended on behalf of the State that, if this is the case, the tax can be sustained under either the State or Federal Constitution.

It must, therefore, be admitted that if it is a property tax, it violates the State Constitution, which requires uniformity, forbidding double taxation on property; and for the State court to enforce it against oil producers is to deny them the equal protection of the State Constitution and laws.

See

Hanover Fire Ins. Co. *v.* Carr, 47 S. C., 179, decided November 23, 1926.

It is also contended that the Act of 1918 does not violate the Fourteenth Amendment by failure to afford due process of law to the owner of the oil whose property is taken under it. No comment is made by the

learned Attorney General on the cases in this Court cited by us on the proposition, nor on the rule that due process of law requires that, after appropriate notice, the taxpayer must be afforded an opportunity to be heard as to the validity and amount of the tax, by giving him the right to appear for that purpose at some stage of the proceedings. The cases cited by him do not conflict with the rule.

Citizens' National Bank of Kentucky, 217 U. S., 443, involved the taxation of a national bank by assessing its shares of stock and is not apposite.

In Merchants' Bank *v.* Pennsylvania, 167 U. S., 461, the portion of the opinion quoted shows that an opportunity was afforded to any stockholder who might desire to be heard.

In Bells Gap R. R. Co. *v.* Pennsylvania, 134 U. S., 232, the valuation of the property to be assessed, bonds, was fixed by law at face value, which the court held obviated the necessity for a hearing.

People's National Bank *v.* Marye, auditor, 107 Fed., 570, was another case of assessment of shares of a national bank.

We suggest that notice to the transporter of oil of the assessment of the tax is not appropriate notice to the owner; that, by reason of diversity of interest, the transporter should not and cannot be made by law the agent of the owner, so that notice to the transporter will satisfy the requirements of due process. Moreover, no opportunity for hearing is afforded the owner, even if the matter of notice should be overlooked.

It is submitted that this objection may not be brushed aside by saying that this petitioner has not been prejudiced by such invalidity in the law, because its pleading shows that the exact amount of the tax provided by the act was imposed upon it. The fact that any tax whatever is exacted under a void and unconstitutional law is sufficient prejudice to the taxpayer to entitle him to relief.

VI.

In argument that the Act of 1918 does not violate the commerce clause of the Constitution, notwithstanding the fact that it imposes the tax only when and after the oil has been started upon an interstate transportation, it is contended on behalf of the State that such imposition is merely the measure of a perfectly legitimate license tax for the local occupation of producing the oil, and is not a tax on the transportation itself. It is, however, a direct and forbidden burden upon such commerce. Such a bad measure of a tax that might be otherwise measured renders the act void.

The vice of the act in this respect is not that it imposes a license tax, but that it burdens and interferes with interstate commerce.

Anderson *v.* Shipowners' Assn., 47 S. C., 125, 126 (decided November 22, 1926).

See

Alpha Portland Cement Co. *v.* Mass., 268 U. S., 203.

The cases of Oliver Iron Co. *v.* Lord, and American Mfg. Co. *v.* St. Louis, cited by counsel, are not apposite, because in the former the measure of the tax was the value of the ore before it entered into interstate commerce, and in the latter the measure was the sales value of goods irrespective of the place of sale, the court finding there was no burden on interstate commerce.

VII.

It is finally contended on behalf of the State that, if the Act of 1918 should be held to be void upon any or all of the grounds alleged, it would leave the 1917 Act in effect, and, "unless the original Act of 1917 is found to be likewise objectionable," the tax in the same amount would be due thereunder, so the plaintiff in error would not be entitled to recover it. The Court of Appeals of Kentucky, in its decision in this case, has held that, if the 1918 Act is void, precisely the same tax would have been due under the 1917 Act, thus in effect holding that the 1917 Act is valid, and it denied relief, saying in effect to the taxpayer—

> "Yes, the 1918 Act is void, but the 1917 Act is left in effect. No assessment was ever made under the 1917 Act, or notice thereof given, which under the terms of the act must be done before any taxes are due. Although your money has been extorted by the State in an unauthorized manner, still it is no more than you would have been required to pay, if the authorized forms of law had been followed, and you are not

> permitted to recover it, though we have no intention of proceeding to assess and collect according to the 1917 Act."
>
> "Again, although the 1917 Act says that the tax is imposed in lieu of all other taxes on the wells producing said oil imposed by law, and the only other taxes then imposed by law were *ad valorem* taxes on said wells and rights to produce the oil, we now hold that, because the said tax could not constitutionally be imposed as a substitute for such other taxes, it was imposed in addition to such other taxes, contrary to the will and design of the legislature."

As a matter of general statutory construction, we might well question whether the invalidity of the 1918 Act in part, or as a whole, would leave the 1917 Act in full effect, but, assuming that the statement to this effect in the Kentucky courts' opinion would be accepted, let us see whether or not the Act of 1917 can be sustained.

The present case is the first one in which the Kentucky court has been called upon, or undertaken, to construe the Act of 1917, and, as before noted, its decision, made after the rights here involved accrued, is not binding on this Court. In view of the difference of language of the two acts, the 1917 Act containing the words "imposed by law" in designating the taxes in lieu of which the tax thereby provided was imposed, which words are not to be found in the 1918 Act, it is plain that it was intended to substitute the new tax for the *ad valorem* tax, which was the only one "im-

posed by law." This the legislature had no power to do under the State Constitution, as now clearly seen, and settled by the State decisions. For the State court to now say, since the rights have accrued, that the tax must be imposed in addition to, and not in lieu of the other taxes, is to deny to such taxpayers the equal protection of the laws forbidding double taxation on property. In this respect the 1917 Act is more clearly violative of the Fourteenth Amendment than is the 1918 Act.

Although it is admitted that the taxes here involved were imposed under the 1918 Act, and that the provisions of the 1917 Act as to assessment and notices were never complied with, the State seeks to justify such procedure and deny any relief, which is clearly a denial of the due process of law required by the Constitution.

It is sought to be made to appear from the language of section 162 of Kentucky statutes that the taxes are not recoverable if, in fact, any taxes are due the State "independent of the mistaken payment." It will be noted that the clause from which the above quotation is made refers only to the "tax due on any tract of land" and cannot be extended by inference to license taxes or taxes on personalty.

The taxes paid under the void 1918 Act are recoverable under section 162, whether or not the Act of 1917 remains valid. No taxes can be due under the 1917 Act until after assessment and notice.

It is respectfully submitted that the judgment denying plaintiff relief against the exaction of such tax should be reversed.

A. O. STANLEY,
E. L. McDONALD,
Attorneys for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1925

No. [redacted] 148

Swiss Oil Corporation, - - - Plaintiff-in-Error,

vs.

Wm. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky, - - - - - Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR

In error to the Court of Appeals of Kentucky.

FRANK E. DAUGHERTY,
Attorney General of Kentucky.
CHAS. F. CREAL,
Assistant Attorney General of Kentucky.
Attorneys for Defendant-in-Error.

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Supreme Court of the United States

OCTOBER TERM 1925

No. 556

SWISS OIL CORPORATION - - *Plaintiff-in-Error*

vs.

WM. H. SHANKS, Auditor of Public Accounts for the Commonwealth of Kentucky, *Defendant-in-Error*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT-IN-ERROR

It is contended by defendant-in-error that the Act of 1917 (R. 9, 11) as amended by the Act of 1918 (R. 11, 14) does not violate any provisions of the Federal Constitution, but even in the event it is determined that it does, plaintiff-in-error is not entitled to the relief sought in its petition unless the original Act (1917) is likewise obnoxious to said instrument.

While we might concede that on its face some provisions of the amended Act approach near the dividing line where the recognized exclusive powers of the State end and the like powers of the Federal Government begin, we can not recognize any color of merit in a contention

that the original Act in any respect contravenes the Constitution of the United States or that it even approaches near the established limits of the State's powers in respect to matters of taxation.

We feel justified in assuming that this court, following its long established rule, will adopt the construction of said Acts by the highest court of the State insofar as any alleged conflict with the Constitution or laws of the State is involved. The Court of Appeals of Kentucky has already determined that the Act complained of does not violate any provision of the Constitution of the State and therefore this court is only called upon to determine whether it violates any provision of the Federal Constitution.

I.

TAX IMPOSED BY THE ACT NOT A PROPERTY TAX

The Act of 1917 was first attacked in the State courts in the case of Raydure v. Board of Supervisors of Estill County, reported in 183 Ky. 84. A reading of the opinion in that case discloses that W. S. Raydure, who owned a number of leases in Estill County, Kentucky, was resisting the assessment of said leases for taxation. The assessment was made by the Board of Supervisors, the leases not having been listed by the owner. Raydure appealed from the action of the Board to the Quarterly Court of the county and from that court to the Circuit Court, and finally to the Court of Appeals.

The Court of Appeals, after disposing of the question as to the correctness of the procedure in making the assessment, and determining in favor of the State the contention made that oil leases were not property and therefore not subject to ad valorem taxation, passed to a consideration of the questions pertinent to the issues in this litigation. Answering first the contention made

that even if the leases in question had a cash value and could be sold for cash at a voluntary sale they should not be assessed for ad valorem taxation for the reason that the tax imposed by the Act of 1917, which was found in Section 4223c, Kentucky Statutes, was intended to and did include the value of the leases on the land from which oil was produced, the Court held that the tax imposed by the Act was not in lieu of the ad valorem tax to which the oil leases covering the producing territory was subject. The court pointed out that under Section 171 of the Constitution, as originally adopted, the legislature could not substitute a license tax for the ad valorem or property tax and that this prohibition was continued by the amendment of said section permitting the legislature to "divide property into classes and to determine what class or classes of property shall be subject to local taxation."

The court among other things said (page 95):

> "But it is further insisted that the oil leases here in question should not be assessed even if they have a cash value and could be sold for cash at a fair voluntary sale because, as said, the oil production tax provided for in section 1 of an act of 1917 that may be found in section 4223c of volume 3, Kentucky Statutes, was intended to and does include the value of the lease on the property from which the oil is produced. . . . . "

(Pages 96-97):

> "It would also necessarily follow if the position of counsel is well taken that the production tax would be substituted for and take the place of the ad valorem or property tax that we have held the oil leases subject to.
>
> In considering this contention the first question that naturally suggests itself is—Was it the purpose of the legislature in the enactment of this production tax statute, that the tax imposed should be in lieu of the ad valorem or property tax to which the oil lease covering the producing territory was subject, and

if such was the intention of the legislature, did it under the Constitution have the power to provide that a production tax might be in lieu of a property tax to which the property would be subject except for the production tax?

Previous to the amendment of section 171 of the Constitution by the amendment that was adopted in November, 1915, section 171 provided in part that 'taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law.' Under this original section it was held, in Levi v. City of Louisville, 97 Ky. 394, that the legislature had no power to substitute a license tax or any other kind of a tax in lieu of the uniform ad valorem property tax or to classify property for taxation. . . . "

(Pages 97-98):

"It was held, as we have seen in the Levi case, that the legislature was prohibited by section 171 of the Constitution from substituting a license tax for an ad valorem tax, and this prohibition was continued by the amendment to section 171. It is no more allowable under the amendment to substitute a license tax for an ad valorem tax than it was before the amendment. The only character of taxes that can be imposed under section 171, either before or since the amendment, is ad valorem or property taxes. If, by authority of the amendment, property is classified, as it may be for taxation, the tax that is imposed on the class under this section must be an ad valorem or a property tax. Neither the rule of uniformity nor the nature of the tax was changed in any manner by the amendment. The only change was the authority to classify, but when the classification is made the tax imposed must be an ad valorem or property tax and must be a uniform tax.

The tax provided for in this legislation was a license tax on the business and not a property tax. This is made plain by the title of the act of 1917, which reads: 'An act imposing a license or franchise

on any person, firm, corporation or association engaged in the production of oil in this state and authorizing counties also to impose such tax . . . ; providing methods of determining the amount of tax due . . . ;' and by the title of the act of 1918, which is an amendment of the act of 1917, and recites that it is 'An act to amend and reenact . . . the act . . . of 1917, which act imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this state.' Thus showing very plainly the nature and purpose of the act. . . . . "

(Page 99):

"As we have endeavored to show, the legislature of 1917 did not and could not if it had so desired enact that the oil production tax should be in lieu of or as a substitute for an ad valorem tax on any species of property. The act itself is not susceptible of this construction, but if it were, and could not be interpreted to have any other meaning, it would necessarily be in conflict with section 171 of the Constitution and therefore void.

The validity of this statute, however, and the tax imposed by it may be upheld under section 181 of the Constitution as a license tax on the business of engaging in the production of oil. It cannot be sustained on any other ground. . . . "

(Pages 101-102):

"There being no contention that this act is either discriminatory or unreasonable there is no room to doubt that the imposition of this tax as a license tax on the privilege of producing oil was authorized by section 181 of the Constitution; nor is there any authority to be found holding that it is not competent for the legislature to impose a license tax for the privilege of doing business in addition to the ad valorem tax that may be imposed upon the property engaged in the business . . .

> It follows from what has been said that the production tax on the oil produced is separate and distinct from the ad valorem tax to which the leases are subject and cannot operate to exempt them from the property tax."

In the case of Craig, Auditor v. Security Producing and Refining Company, 189 Ky. 565, 566, 567, the Court of Appeals again recognized the tax imposed by the Act in question (Section 4223c Ky. Stats.) as a license tax. It appears from the opinion in that case that the Refining Company had paid a capital stock license tax for the years 1918 and 1919 under Sections 4189a and 4189c, Kentucky Statutes, as well as the tax equal to one per centum of the market value of crude petroleum produced by it. The producing company was seeking to recover from the State Treasury in an action brought pursuant to section 162 of Kentucky Statutes the capital stock license tax paid for said years on the idea that it had paid two license taxes for said years. The court among other things said:

> "It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under sections 4189a and 4189c, when it was required to and did pay to the state a licence tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under section 4223c on its oil production, it was by the provisions of section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter."

The Court of Appeals affirmed the judgment of the lower court, granting to the Refining Company the relief prayed for. The court was necessarily considering the Act of 1917 (Sec. 4223c, Ky. Stat.) as amended by Act of

1918 which became effective on March 29, 1918, when it rendered this opinion.

In the case of Associated Producers Co. v. Board of Supervisors of Estill County, 202 Ky. 538, 540, 541, 542, it appears that the Producers Co. had listed in 1921 its leases for taxation for 1922, but had omitted the producing wells from its list. The company admitted that it omitted to list its wells and also admitted that the value fixed by the assessing authorities would be reasonable if the wells were included. The Court of Appeals in disposing of the contention that the tax imposed by Section 4223c-1, Kentucky Statutes, was in lieu of all other taxation on leases said:

> "It is the contention of the oil company that when section 4223c-1 Kentucky Statutes was enacted the legislative intention, desire and expectation was that the license tax therein provided should be in lieu of all taxation on oil leases. It cannot be presumed that the General Assembly intended to pass an unconstitutional act or one which contravenes our fundamental law. If it intended to exempt the wells from an *ad valorem* tax its wish ran counter to our Constitution, and while the desire might have been to exempt the leases from *ad valorem* taxation, the act itself did not so provide, but on the contrary provided that the production tax should be in lieu of all other taxes 'on the wells producing crude petroleum.' In other words, there should be no other license tax as we construe this language."

The opinion then calls attention to the fact that Raydure v. Board of Supervisors, *supra,* was relied on by the Producers Company as authority for exempting oil wells from the valuation of leases for purposes of taxation, and the court quotes that part of the Raydure opinion which would indicate that the value of the leases should be fixed "excluding the value of each producing well thereon," and calls attention to the fact that the com-

pany overlooked a more important point discussed in the Raydure opinion, quoting from that part of the opinion which held in substance that the tax imposed by the Act complained of was separate and distinct from the ad valorem tax to which the leases were subject and could not exempt them from property tax, and that the court was not called upon to determine whether the Board of Supervisors had authority to make an exemption of five acres or any number of acres as Raydure was not complaining of the action of the board in exempting five acres around each well. Continuing at pages 541 and 542 the court said:

> "It is clear from the statutes, section 4223c-1, no less than from the opinion in the Raydure case, supra, that the tax intended to be imposed was merely a production or license tax. It could be nothing more. Under our Constitution, sections 171 and 172, all property of value must be assessed for ad valorem taxation, and as a well with or without its equipment is such property it is subject to an ad valorem tax. If the wells, separate from the lease, have value they must be subjected to an ad valorem tax. The section of the statute to which we have reference relates merely to a production or excise tax; so we held in the Raydure case, supra. That part of the opinion in the Raydure case which relates to the amount of acreage that should or could be laid off around a well as exempt is mere query or suggestion, not amounting even to dictum, for we expressly withheld opinion upon the question. That part of the opinion is now withdrawn as inapt."

In the case at bar the Court of Appeals of Kentucky in an opinion written by Judge Clarke (R. 28-33), reported in 208 Ky. 64, sets at rest any doubt as to the nature of the tax imposed by the Act complained of, holding the tax to be upon the business of producing oil in this State and that the Act does not conflict with the

State Constitution. We do not deem it necessary to here quote from the opinion as it is in the record and speaks for itself.

II.

ACT PROPERLY CONSTRUED BY COURT OF APPEALS OF KENTUCKY

The Court of Appeals of Kentucky in construing the statute in question as imposing a license or occupation tax upon the business of producing crude petroleum and that said tax was not in lieu of ad valorem or property taxes on the oil leases followed the universally adopted and well recognized rules of statutory construction.

In construing statutes courts will presume that the legislative body enacting same knew and intended to act within the scope of its authority, and that such body had full knowledge of the provisions of the Constitution with reference to the law enacted.

The presumption must then follow that in enacting this legislation the General Assembly of Kentucky acted in the full knowledge of the constitutional limitation against exempting property from ad valorem taxation or substituting in lieu thereof a license tax.

> "All statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law with reference to it. They are therefore to be construed as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the Constitution, but also in connection with other statutes on the same subject. . . . . Where two statutes are in apparent conflict they should be so construed, if reasonably possible, to allow both to stand and to give force and effect to each."
>
> 36 Cyc. 1146.

In the case of St. Louis & S. W. Ry. v. Arkansas, 235 U. S. 350, 369, the court laid down the following rule of construction:

> "No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the Legislature intended to act within the scope of its authority."

In Cooley's Constitutional Limitation, 7th Ed. at page 255, we find the rule laid down as follows:

> "The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such construction of the Statute as might not at first view seem most obvious and natural. For as a conflict between the Statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the Court, if possible, must give the Statute such a construction as will enable it to have effect. This is only saying, in another form of words, that the Court must construe the Statute in accordance with the legislative intent; since it is always to be presumed that the legislature designed the Statute to take effect and not to be a nullity.
>
> The rule upon this subject is thus stated by the Supreme Court of Illinois; 'Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts.' "

And continuing on page 256 the same author says:

"The Supreme Court of New Hampshire, a similar question being involved, recognized their obligation 'so to construe every act of the legislature as to make it consistent, if possible, with the provisions of the Constitution,' proceeded to the examination of a Statute by the same rule, without stopping to inquire what construction might be warranted by the natural import of the language used."

In Lewis' Sutherland on Statutory Construction, 2nd Ed., Section 83, page 135, we find the following:

"Another universal principle applied in considering constitutional questions is, that an act will be so construed, if possible, to avoid conflict with the Constitution, although such a construction may not be the most obvious or natural one. 'The courts may resort to an implication to sustain a statute, but not to destroy it.' "

In Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546, we find the following:

" . . . It is a general and fundamental rule that if a Statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of its constitutional authority."

To the same effect as the Plymouth Coal Co. case see:

United States v. Delaware & Hudson Co., 213 U. S. 366.

Knights Templars' Indemnity Co. v. Jarman, 187 U. S. 197.

III.

THE SUPREME COURT OF THE UNITED STATES WILL ACCEPT THE CONSTRUCTION OF A STATE STATUTE BY THE STATE COURT.

The construction of a State Statute by the highest court of the State is usually accepted by the Supreme Court of the United States. The Court of Appeals of Kentucky has definitely determined that the tax imposed by the Statute under consideration is a license or occupation tax on the business of producing crude oil, and imposes in addition to and not in lieu of the ad valorem tax on leases, and this court will be inclined to adopt such construction.

In the case of Dawson, Attorney General of Kentucky v. Ky. Dist. & Warehouse Co., 255 U. S. 288, 292, the court said:

> "The question is one of local law, so that a decision by the highest court of the State would be accepted by us as conclusive."

In the case just quoted from this court had under consideration a statute of Kentucky imposing a tax upon the business of "owning and storing" distilled spirits in bonded warehouses, it being contended by the plaintiffs in bills filed in the district courts that the statute was void under both State and Federal Constitutions. The validity of the statute had not been passed upon by the state court. The court in its opinion stated that the tax in question had none of the incidents of an occupation tax and held it was a property tax, but indicated that a decision of the question by the state court would have been conclusive.

In this connection we would call attention to the fact that the court in its opinion stated that section 181 of

the state Constitution authorizes license or occupation taxes and that statutes imposing such taxes, measured by the amount of product, have been repeatedly sustained by the highest court of the state, citing Raydure v. Board of Supervisors, *supra*, and Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 604.

Again in the case of Brown-Foreman Co. v. Kentucky, 217 U. S. 563, 569, 572, the Supreme Court in disposing of contentions made that a statute of the State of Kentucky imposing a tax upon the business or occupation of compounding, rectifying, etc., distilled spirits was repugnant to the Constitution of Kentucky and the Federal Constitution said:

> "The questions concerning the validity of the Act under the State Constitution and as to the liability of the plaintiff-in-error under the Act as construed and enforced by the highest court of Kentucky, may be laid on one side, for the only contentions which concern us under this writ of error to the State Court are those which arise under the Constitution of the United States . . .
>
> Such a construction and interpretation of the Statuate here involved by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business, plainly subject to the regulating power of the State."

In the case of Tullis v. Lake Erie & Western Railroad Co., 175 U. S. 348, 353, the court had this to say:

> "As remarked in Missouri, Kansas, &c., Railway v. McCann, 174 U. S. 580, 586, the contention calls on this court to disregard the interpretation given to a State Statute by the court of last resort of the State, and, by an adverse construction, to decide that the State law is repugnant to the Constitution of the United States. 'But the elementary rule is

that this court accepts the interpretation of a statute of a State affixed to it by the court of last resort thereof.' "

And in the case of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 42, 43, the court said:

> "The courts of Texas have like power of interpretation of the Statutes of Texas. What they say the Statuates of that State mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts."

IV.

THIS COURT HAS UPHELD SIMILAR LICENSE TAX LAWS IN KENTUCKY AND OTHER STATES.

In 1906 the General Assembly of Kentucky enacted a law imposing upon every person, firm or corporation engaging in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, a license tax of one-fourth of one cent upon each wine gallon of such compound. The law was attacked in the state courts, the plaintiff making practically the same contentions as to the invalidity of the law with respect to the State and Federal Constitutions as is made by plaintiff-in-error in this case. The Court of Appeals of Kentucky upheld the act as imposing a valid license or occupation tax and not a property tax, and in the case of Brown-Foreman Co. v. Kentucky, *supra*, this court affirmed the decision of the said court.

In the case of Clark v. Titusville, 184 U. S. 329, 334, the court, considering a city ordinance imposing a tax upon persons engaging in certain occupations, the tax on a business of a given class being regulated according

to the volume of business or minimum and maximum amounts of sales, held:

> "The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States."

By a statute enacted by the legislature of Minnesota a tax of six per cent of the value of all ore mined or produced in the state was imposed upon every person engaged in the business of mining or producing iron or other ores.

The Supreme Court of the United States in upholding this law in the case of Oliver Iron Co. v. Lord, et al., 262 U. S. 172, 176, 177, said:

> "The parties differ about the nature of the tax, the plaintiffs insisting it is a property tax and the defendants that it is an occupation tax. Both treat the question as affecting the solution of other contentions. There has been no ruling on the point by the Supreme Court of the State. We think the tax in its essence is what the Act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after the removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts. Mining is a well recognized business wherein capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business, and laid on them solely because they are so engaged, as is the case here, is an occupation tax. It does not differ materially from a tax on those who engage in manufacturing."

The tax imposed by the act in controversy is not imposed upon the oil nor upon the transportation of the

oil. Neither is it upon the land from which the oil is removed, but is upon the business or occupation of producing crude oil and is simply regulated by the value of the oil produced. To so regulate a tax does not constitute it a property tax.

V.

THE ACT DOES NOT VIOLATE ANY PROVISION OF THE FOURTEENTH AMENDMENT

If, as we contend and have tried to show, the tax in question is upon the occupation or business of producing crude oil, no provision of the Fourteenth Amendment of the Federal Constitution is violated.

There is no want of uniformity or equality because the legislature selected one class or occupation as a subject for its taxing power, so long as the tax applies alike to all of the class under like circumstances and conditions.

The Fourteenth Amendment does not impose upon states iron rules of taxation intended to cripple and hamper them in their taxing power, and they may without contravening this amendment classify occupations, imposing a tax on a class or imposing different taxes on different classes and not imposing a tax on others. It only requires that all of a particular class be treated alike. Southwestern Oil Co. v. Texas, 217 U. S. 114.

In Oliver Iron Co. v. Lord, *supra,* the court in 262 U. S. at page 179, said:

> "The contentions made under the equal protection provisions of the 14th Amendment and under the State Constitution provision that 'taxes shall be uniform upon the same class of subjects' present a question of classification and have been argued together.
>
> Consistently with both provisions, the Legislature of the State may exercise a wide discretion in

> selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class, and all members of the class are dealt with according to uniform rules."

Neither does it appear that the act deprives the taxpayer of his property without due process of law in that it does not provide for personal notice to him of the assessment by the Tax Commission.

The original act (R. 9-11) required each producer to make reports of crude oil produced by him and after receiving notice and having opportunity to be heard, to pay the taxes. It also required pipe line companies to make reports under sections 7 and 8 of the act (R. 10). Under the amended act (R. 11-14) a transporter is required to make the reports, and after notice and opportunity to be heard, to pay the tax for the producer.

This court has held in numerous instances that personal notice is not essential to due process of law in respect to taxation.

In the case of Citizens' National Bank v. Kentucky, 217 U. S. 443, 453, this court quoted with approval from an opinion in Commonwealth v. Citizens' National Bank, 117 Ky. 946, 957, wherein it was held:

> " . . . While neither the bank, nor its president, nor its cashier is the owner of the shares of stock, the bank is made by the act the agent of the shareholders, and the notice to it is notice to his agent, within the meaning of Section 4241. The president and cashier were properly made defendants because it is made their duty by the statute to list the stock. The bank is required to keep a list of its shareholders, and therefore knows who they are. Notice to the agent in an assessment of property is sufficient notice to his principal."

In the case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, 466, 467, the court in considering a statute of Pennsylvania which made the bank its agent to collect a tax on the capital stock held by individuals, and in answering an objection, urged that there was lack of due process in that the shares were subjected to a tax without notice or hearing being afforded to the individual shareholders, said:

> "A final objection is that there is a lack of due process of law, in that the property of the shareholders is subjected to an ad valorem tax without an opportunity being given to them to be heard as to the value. It is true the statute contemplates no personal notice to the shareholders, but that has never been considered an essential to due process in respect to taxation. The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard."

Under the amended act the producer knows when his oil is removed from his tanks and the act gives him all the notice required as to the time for making reports, making assessments, hearing complaints and paying the taxes.

In the case of Bell's Gap R'd Co. v. Pennsylvania, 134 U. S. 232, 238, 239, it was urged that bondholders were deprived of their property without due process of law because the corporation was required to make the reports to the assessing authorities and to pay the tax.

The court said:

> "2. *As to want of notice to the owners of the bonds.* What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed; and that they will only be required to pay this tax when, and as, they receive the interest. If

the State may assess the tax upon the face value of the bonds, notice *in pais* is not necessary. We think that there is nothing in this objection which shows any infraction of the Federal Constitution. It is urged that it is a taking of the bondholder's property without due process of law. We must confess that we cannot see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation complained of, which is obnoxious to constitutional objection on this score. Stockholders in the national banks are taxed in this way, and the method has been sustained by the express decision of this court. *National Bank* v. *Commonwealth*, 9 Wall. 353

3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection."

In the case of People's National Bank of Lynchburg v. Marye, Auditor, 107 Federal Reporter, 570, the court had for consideration an act imposing a tax on the market value of the shares of stock in banks, the tax being assessed against the holders of the shares. The shares were assessed against the shareholders and the bank required to pay the tax, no personal notice being given to the

shareholders. The court in disposing of the question as to whether the taxpayer was deprived of his property without due process of law for want of notice, at page 580 said:

> "A careful inspection of the act shows that the assessor performs no judicial act in what he does; the fair interpretation being that the assessment made by him is upon the market value of the stock as reported to him by the bank, and the act itself fixes the amount of the tax; and, under this view, further notice to the taxpayer of the assessment is not required."

Under the act in question the assessing authority is required to make his assessment upon the market value of the oil produced and reported to him. The producer was notified by the act when assessment would be made and when hearing might be had.

The notice to the transporter as agent in addition to the notice given by the act itself appears to have afforded plaintiff-in-error all necessary protection, as the petition discloses no prejudice due to want of personal notice. It is alleged in its petition (R. 1-2) that it produced 421,125.53 barrels of crude oil or petroleum of the market value of $894,463.91, and that a tax of one per cent of the market value of same was assessed for state purposes and the tax paid by the transporter and collected from it, and further on in its petition it is shown that plaintiff-in-error was required to and did pay the sum of $8,944.64, which is one per cent of the market value of the oil as set out in its petition and which sum it now seeks to recover. The petition on its face shows that plaintiff in error only paid as a tax one percentum of the market value of the crude petroleum produced by it during the period in controversy, hence it was not prejudiced if in fact it did not receive personal notice of the assessments made by the Tax Commission.

VI.

THE ACT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION

We now come to the most serious objection made by plaintiffs-in-error to the act in question. The amendment of 1918 provides that the tax imposes when the crude oil is first transported from the tanks or other receptacles at the place of production.

In construing amendments where there is doubt as to the meaning of an act, a court may look to the original act if necessary to ascertain the purpose and meaning of the amendment.

It clearly appears that the legislature did not intend by the amendment to change the nature of the tax, the sole and only purpose being to overcome and to avoid the difficulty in the administration of the original act (R. 14), and as said in Bell's Gap R'd Co. v. Pennsylvania, *supra,* "This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party."

The tax is not imposed in respect to the ownership of the crude oil nor to the transportation of same, but imposes in respect to the business of engaging in the production of crude oil in the state of Kentucky.

In the case of Oliver Iron Co. v. Lord, *supra,* the court at page 179 said:

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such, commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

Producing crude oil is local business like manufacturing and is subject to local regulation, but the crude oil does not in any event enter interstate commerce until after it is brought to the surface. The act in question makes no discrimination against interstate commerce, and while it may indirectly and incidentally affect such commerce it is not in our opinion a direct burden or interference upon such commerce. If hurtful at all it is only remotely so.

The city of St. Louis, under authority granted by its charter, provided for a tax upon the right to manufacture goods within the city, the tax being computed upon the amount of the sales of the goods so manufactured.

In the case of American Manufacturing Co. v. City of St. Louis, 250 U. S. 459, 463, the court in upholding the tax among other things said:

> "The admitted facts show that the operation and effect of the taxing scheme now under consideration are correctly described in what we have quoted from the opinion of the State Court. No tax has been or is to be imposed upon any sales of goods by plaintiff-in-error except goods manufactured by it in St. Louis under a license tax conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the city of St. Louis."

The act under consideration as construed by the state court is a tax imposed upon the business of producing crude oil. "The settled construction of a state

statute by its Supreme Court is considered a part of the statute itself." Massingill v. Downs, 7 How. 760.

No tax is to be imposed except on oil produced in the State of Kentucky, and the tax is computed according to the market value of the oil produced whether sold within or without the state and whether in interstate or intrastate commerce.

The fact that the imposition and payment of the tax is postponed is not prejudicial or hurtful to the producer or transporter, and the amount of the tax is the same whether exacted at the time the crude petroleum is produced or is deferred until it is removed and sold.

Any suggestion that the producer might store his oil at the place of production and thereby evade the payment of the tax may be aptly met by the words of the court in the opinion of American Manufacturing Co. v. St. Louis, *supra*, when it was said:

> "It is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses."

VII.

PLAINTIFF-IN-ERROR NOT ENTITLED TO RELIEF SOUGHT EVEN THOUGH ACT OF 1918 SHOULD BE HELD UNCONSTITUTIONAL.

We contend that plaintiff-in-error is not entitled to the relief sought by its petition even though the court should determine and hold that the Act of 1918 is obnoxious to the Federal Constitution and therefore invalid, unless the original Act of 1917 is found to be likewise objectionable. The original Act, as construed by the highest court of the State, is not subject to any of the criticisms made to the amended Act. It does not violate

any provision of the Federal Constitution, therefore it will stand and remain in effect in the event the amendment is held void.

If the Act of 1918 is unconstitutional it is of no more force or effect than if it had never been enacted, and it did not and could not have the effect of amending or repealing the Act of 1917. This principle is well recognized by all State and Federal courts and by text writers. We shall content ourselves with quoting only a few of the many authorities on this point:

> "Where a statute which undertakes to amend and re-enact an existing statute is invalid, the existing statute remains in force."
>
> 36 Cyc. 1056.

> "An unconstitutional Act is not a law; is confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
>
> Norton vs. Shelby County, 118 U. S. 425, 442.

> "The validity of a constitutional enactment such as the act of 1890 cannot be impaired or affected by an unconstitutional amendment. The amendment may be held invalid, but the act it amends, if free from constitutional objections, will stand as it did before the unconstitutional amendment. It cannot for a moment be entertained that an unconstitutional amendment to a valid act can destroy the validity of the act. The amendatory act is void from its inception, and may be entirely discarded as unaffecting the original act."
>
> Gay vs. Brent, 166 Ky. 833, 849, 850.

> "It is contended, however, that as the act of December 10, 1903, was null and void . . . .
>
> "Let this be conceded. The act of December 10, 1903, being void, the chapter which it undertook to

amend and re-enact remains in force as it stood prior to that date."

Whitlock vs. Hawkins, 105 Va. 242, 253.

"Where, however, it is not clear that the legislature, by a repealing clause attached to an unconstitutional act, intended to repeal the former statute upon the same subject except upon the supposition that the new act would take the place of the former one, the repealing clause falls with the act to which it is attached."

State ex rel, Law vs. Blend, 121 Ind. 514, 518, 519.

Judge Cooley in writing the opinion in the case of Campau v. City of Detroit, 14 Michigan, 276, 285, 286, had this to say:

"The Act of 1865 contained many other provisions, the validity of which is not disputed, so far as we are informed; and the last section repeals all acts and parts of acts inconsistent with its provisions. The plaintiff in error contends that, even if the sections which relate to a jury are invalid, the last section must still have the effect to repeal the original sections.

If the repealing clause had in express terms repealed certain acts and parts of acts by name, and the act had then gone further, and attempted to substitute unconstitutional provisions, the argument which has been made would be more plausible than it seems to us now. But the repealing clause here in question is distributive in its application to each section of the act, and neither in words nor in apparent design undertakes to repeal any acts or parts of acts, except those which would come in conflict with the provisions it attempts to substitute. The repeal was simply to displace all conflicting provisions, so that these could have full effect. But nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its being inconsistent with a section of this law which is entirely unconstitutional and void."

In the case of People, ex rel. Farrington v. Mensching, 187 N. Y. 8, 22, 23, Judge Vann said:

> "A section in a later act amending a section in an earlier act, 'so as to read as follows,' if followed by a blank space only, would effect no change in the law. That is the legal effect of the situation before us, so far as the question now involved is concerned. The section of 1906 is void, at least in the respect mentioned, and a void thing is no thing. It changes nothing and does nothing. It has no power to coerce or release. It has no effect whatever. In the eye of the law it is merely a blank, the same as if the types had not reached the paper. It neither repealed nor substituted, for as it is void it could no neither . .
>
> The new section never breathed. Instead of blotting out the earlier it was blotted out itself. Instead of amending 'so as to read as follows' it did not amend in any respect. Conceding that the two sections cannot stand together, still the earlier is the only one that ever stood at all."

Judge Clarke, writing the opinion of the Court of Appeals in the case at bar (R. 28, 33), 208 Ky. 64, 71, said:

> "The amendment is simply a re-enactment of the original act, with the latter's administrative features so changed as to make the collection of the tax both more certain and less burdensome upon the taxpayer and the assessing and collecting officials. If any or all of the above contentions are sound, the amendment would be destroyed, but this would leave the original act in force, and unamended."

Attorneys for plaintiff-in-error realizing the force of this argument would avoid it by asserting that the tax sought to be recovered was assessed and paid under the 1918 Act, and if the 1918 Act should be held invalid it would follow that the assessment and collection of the tax was invalid and plaintiff-in-error would therefore be

entitled to a refund of the taxes paid during the period in question. It may not be so lightly brushed aside. The tax is the same whether paid under the amended Act or under the original Act before it was amended. Any right to a refund of taxes paid into the Treasury of the State must be based on Section 162 of Kentucky Statutes which reads as follows:

> "When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

Under the foregoing section plaintiff-in-error is not entitled to a refund unless it shall be made to appear that it paid taxes into the treasury when no such taxes were in fact due.

Turning again to the allegations of the petition we find that plaintiff-in-error admits that during the two year period for which recovery is sought it produced 421,125.53 barrels of crude oil or petroleum in the State of Kentucky, and that the market value thereof was $894,463.91 (R. 1); that it paid into the State Treasury the sum of $8,944.64, being one per cent of the market value of the crude petroleum produced by it (R. 4). So under the allegations of the petition, plaintiff-in-error paid exactly one per cent of the market value of the crude petroleum produced by it in the State of Kentucky, and the amount would have been the same if the tax had been paid under the Act of 1917, therefore it must follow that

it has not paid into the State Treasury taxes which were not in fact due.

In closing would say we have given no thought to the question of the contemporaneous construction of the Act in question by oil men or by officials charged with the administration of the Act. Such construction clearly must give way to the settled construction of the Act by the highest courts of the State. We call attention to Judge Clarke's discussion of this question in the opinion of the Court of Appeals (R. 31, 32), as well as to the allegations of the petition that following the opinion of the Court of Appeals in Raydure v. Board of Supervisors, *supra,* plaintiff and all other such producers and owners of leases in the State have been required to list its wells, leases, rights and all material and equipment for taxation.

We respectfully ask that the judgment of the Court of Appeals of Kentucky be affirmed, but in the event the Act of 1918 should for any reason be held unconstitutional, we submit that the original Act should remain in effect and plaintiff-in-error should be denied the relief it is seeking.

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SUPREME COURT OF THE UNITED STATES.

No. 148.—October Term, 1926.

Swiss Oil Corporation, Plaintiff in Error, *vs.* Wm. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky.	In Error to the Court of Appeals of the State of Kentucky.

[February 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

The Swiss Oil Corporation, plaintiff in error, instituted a mandamus proceeding in the Circuit Court of Franklin County, Kentucky, to compel the state auditor, the defendant in error, to issue a warrant for the refund of taxes alleged to have been illegally assessed against it, on the ground among others, that the taxing statute was repugnant to the Constitution of the United States. This is the appropriate procedure, under the state law, for compelling a return to the taxpayer of taxes improperly collected. § 162, Carroll Ky. Stat. 1922; *Craig, Auditor* v. *Renaker,* 201 Ky. 576.

The trial court gave judgment for plaintiff which was reversed on appeal to the Court of Appeals of Kentucky. 208 Ky. 64. The case comes here on writ of error. Jud. Code, § 237.

Plaintiff is engaged in producing crude oil in Kentucky and delivering it to pipe lines for transportation to points outside of the state. The tax in question was levied for the period from March, 1922 to February, 1924, pursuant to the Act of March 29, 1918, c. 122, Acts 1918, p. 540, which requires those "producing crude petroleum oil" in the state to pay "in lieu of all other taxes on the wells producing said crude petroleum" an annual tax "of one per centum of the market value of all crude petroleum so produced." Section 3 of the Act provides "the tax hereby provided for shall be imposed and attach when the crude petroleum is first

transported from the tanks or other receptacles located at the place of production." By other sections those engaged in the business of transporting oil are required to report to the tax officials, the amount of oil transported by them and to pay the tax, and they are authorized to collect the amount of the tax from the producer, either in money or crude petroleum. This Act, as stated in its title, is an amendment and re-enactment of the Act of May 2, 1917, c. 7, Acts 1917, p. 40, which similarly required oil producers to pay in lieu of other taxes a "license" or "franchise" tax for the "right or privilege of engaging in such business," within the state. The producers themselves, under the 1917 Act, were required to pay the tax and to report the amount of the oil produced to the State Tax Commission on the first day of July of that year and at the end of each succeeding three months. The taxpayer was entitled, under the 1917 Act, to notice of the valuation placed by the Commission upon the oil produced and had ten days from the time of receiving notice to go before the Commission and contest the valuation. He was privileged to introduce evidence and the Commission was authorized, after a hearing, to change the value set for taxation purposes upon the oil produced.

This Act, as amended, was construed by the Kentucky Court of Appeals, in an earlier decision, *Raydure* v. *Board of Supervisors,* 183 Ky. 84. It there held that the legislature had no power under §§ 171 and 172 of the state constitution to substitute the production tax authorized by the Act of 1917 as amended by the Act of 1918 for the *ad valorem* method of taxing oil producing property required by the constitution, nor to exempt such property from *ad valorem* taxation. Following this decision, the wells and oil producing property of plaintiff and others have been subjected to state, county and local *ad valorem* taxes in addition to the production tax imposed upon plaintiff.

Plaintiff in the state court drew in question the validity of the Act of 1918 as thus construed under the Kentucky constitution. It contended that if construed as imposing a license tax, the statute was unconstitutional in attempting to substitute an occupation for the *ad valorem* tax required by § 172 of the state constitution. The main contention however was that the tax in substance was a property and not a license tax and hence invalid under § 171 of the state constitution requiring uniform taxation since oil properties were subject to two property taxes whereas other classes of prop-

erty were subject to but one. These contentions translated into terms of the Federal Constitution were urged below and renewed here.

It is argued (a) that the Act of 1918 as construed and administered by the state authorities imposes double taxation upon the plaintiff not put on other classes of property, thus denying the equal protection of the laws guaranteed by the Fourteenth Amendment; (b) that it authorizes a tax upon interstate shipments, thus interfering with interstate commerce in violation of Art. I, § 8 of the Federal Constitution; (c) that the tax is assessed and collected without notice and without opportunity to the taxpayer to be heard, in violation of the due process clause of the Fourteenth Amendment.

The court below upheld the tax as a license or production tax valid under the laws and constitution of Kentucky, notwithstanding the imposition of a separate *ad valorem* tax upon the oil producing lands or leases. It disposed of the objections to the tax under the Federal Constitution, saying:

"Each of these criticisms is leveled at, and can affect only, the amendment of 1918, and there is, and could be, no criticism of the title of the original act passed in 1917, or any claim that it imposed any burden upon interstate commerce, or that it did not afford the taxpayer ample opportunity to be heard before the tax attached.

"The original act imposes, just as does the amendment, a graduated occupational tax, measured by the amount of business done by each and every oil producer in the state. The amendment is simply a re-enactment of the original act, with the latter's administrative features so changed as to make the collection of the tax both more certain and less burdensome upon the taxpayer and the assessing and collecting officials. If any or all of the above contentions are sound, the amendment would be destroyed, but this would leave the original act in force, and unamended. Precisely the same tax would have been collected from oil producers in either event."

The court also pointed out that as this is a proceeding by a taxpayer for a refund of taxes under a statute which permits the refund only if the taxes paid were not due, there could in any event be no recovery by the plaintiff since the tax, if not due under the Act of 1918, was due and payable under the Act of 1917.

As the case is brought here from a state court, the construction put by the court below upon the statutes and constitution of its

own state is not open to review here. *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 119; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 569. Since the Kentucky Court of Appeals has held that the plaintiff is not entitled under the state law to the relief prayed even if the Act of 1918 be deemed invalid, no question as to the validity of that act under the Federal Constitution is presented for decision on this record.

But plaintiff argues that this determination of the state court presupposes the validity under the Federal Constitution of the Act of 1917, which has the same vice as the later act. It is contended, as it was of the Act of 1918, that the one per cent. production tax imposed is in effect a property tax. Since the constitution of Kentucky as construed in *Raydure* v. *Board of Supervisors, supra,* does not admit of the substitution of a production tax for an *ad valorem* tax and requires the latter to be levied in addition to the production tax, there is therefore double taxation not imposed on other classes of property and hence a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

We are unable to distinguish the Act of 1917 in its constitutional aspects from the statute of Kentucky imposing a license tax at the rate of one and one-fourth cents per gallon upon those engaged in the business or occupation of rectifying or blending spirits, considered by this Court in *Brown-Forman Co.* v. *Kentucky, supra.* There the tax imposed was assailed on the ground that it was a property tax not assessed upon similar classes of property whether produced within or without the state, and that its imposition resulted in a denial of the equal protection of the laws. But this Court, accepting the state court's interpretation of the tax as a license tax, upheld the statute as based upon a classification which was neither arbitrary nor unreasonable, saying that the reasonableness of the classification was the ultimate question to be determined whether the tax be regarded as a license or a property tax (p. 571). See also *Southwestern Oil Co.* v. *Texas, supra,* where an occupation tax upon wholesale dealers in coal and other mineral oils was upheld despite the fact that wholesale dealers in other commodities were not similarly taxed.

Without a labored analysis of the nature of the taxing measure, we see no reason for not accepting the interpretation of the state court that this statute authorizes a license tax to which there can

be no serious constitutional objection. *Texas Co.* v. *Brown,* 258 U. S. 466, 481; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 649; cf. *Watson* v. *State Comptroller,* 254 U. S. 122. But even if regarded as a property tax, it is imposed alike upon all crude oil produced within the state and there is nothing in the record to suggest that the classification is so palpably arbitrary or unreasonable as to render it invalid. Unlike the state constitution, *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288; *Greene* v. *Louisville & Interurban R. R.,* 244 U. S. 499, the Fourteenth Amendment does not require uniformity of taxation, *Davidson* v. *New Orleans,* 96 U. S. 97, 105, nor forbid double taxation. *St. Louis, S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 367, 368; *Shaffer* v. *Carter,* 252 U. S. 37, 58; *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 533; cf. *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58; *Cream of Wheat Co.* v. *Grand Forks Co.,* 253 U. S. 325; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 109. It is sufficient, as stated, that there be some adequate or reasonable basis for the classification. *Kidd* v. *Alabama,* 188 U. S. 730, 733; *Watson* v. *State Comptroller, supra,* 124, 125; *Maxwell* v. *Bugbee,* 250 U. S. 525, 540; *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, 139; *Coulter* v. *Louisville & Nashville R. R.,* 196 U. S. 599, 608, 609. The particular classification adopted "is not open to objection unless it precludes the assumption that [it] was made in the exercise of legislative judgment and discretion." *Stebbins* v. *Riley,* 268 U. S. 137, 143.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.